For 9 Months—July 1st to March 31st.

	1907.	1906.	Inc. or dec. in 1907.
Average miles operated	1876	1848	Increase 28.
Earnings.			
Passenger, Mail and Express	$3,715,932.88	$3,135,097.09	Inc., $580,835.79—19 per ct.
Freight	19,145,243.32	17,908,977.07	Inc., 1,236,266.25— 7 per ct.
Total earnings	$22,861,176.20	$21,044,074.16	Inc., $1,817,102.04— 9 per ct.
Operating Expenses.			
Maintenance of Way and Structures	$2,975,951.89	$2,512,813.37	Inc., $463,138.52
Maintenance of Equipment	3,865,554.58	3,483,252.89	Inc., 382,301.69
Conducting transportation	7,156,616.14	6,128,324.16	Inc., 1,028,291.98
General Expenses	414,496.71	386,786.41	Inc., 27,710.30
Total Expenses	$14,412,619.32	$12,511,176.83	Inc., $1,901,442.49—15 per ct.
Net Earnings	$8,448,556.88	$8,532,897.33	Dec, $84,340.45— 1 per ct.
Deduct Fixed Charges and Taxes	3,478,748.88	3,061,168.31	Inc., 417,580.57
Surplus	$4,969,808.00	$5,471,729.02	Dec., $501,921.02
Proportion of Expenses to Gross Earnings	63 per cent.	59 per cent.	

JOSEPH W. COXE,
Comptroller.

(Here follows diagram marked p. 157.)

158 VIRGINIA, *City of Roanoke, To-wit:*

Joseph W. Coxe, being duly sworn, deposes and says as follows:

1. I have heretofore given my testimony on behalf of the Norfolk and Western Railway Company before the State Corporation Commission of Virginia in the two proceedings commonly know as the "Freight Rate" and "Passenger Rate" cases, pending before the State Corporation Commission. In my testimony, I furnished to the Commission statements of the results of our Passenger and Freight business in the State of Virginia.

In this testimony, I informed the Commission that the amount of our intra-state freight business was 8.14% of the entire business done in the State of Virginia, including both inter and intra state business, both freight and passenger, and that the intra-state passenger business was 9.42% of said entire business; *i. e.*, the two classes of business aggregating 17.56% of the entire business in Virginia. These percentages were arrived at by myself after having made a careful analysis of two months' business of the freight traffic, to-wit: the months of July and September, 1904; and four months' business of the passenger traffic, to-wit: the months of September and November, 1904, and January and May, 1905, as fully explained in the testimony that I have heretofore given during the hearing.

During my testimony, quite a number of questions were asked me by counsel and Commission as to whether, in my judgment, a percentage arrived at by analysis only of the months in question would afford sufficient evidence to state with reasonable accuracy the percentage of the intra-state business for the entire year. To this question, I responded generally that the months in question seemed to me to be fair average months and I believed that a percentage based on the business of these months would be reasonably accurate for the purpose of the investigation.

Since these proceedings have been instituted, I have been keeping accounts for the purpose of separating our intra-state Virginia business from the inter-state business and I find that, from an analysis of the business of this Company for the months of April, May, June and July of the year 1906, the intra-state business, both freight and passenger, amounts to 18.7% of the entire business of

159 the Company in Virginia, as compared to 17.56% which was the percentage testified to by me as the result of the investigation of the months hereinbefore mentioned and upon which percentage my figures were based.

Considering the fact that, during the year 1906, the Tidewater Railway has been building almost parallel to two hundred and fifty miles of our road and has been compelled to use our road for the movement of employees as well as freight, practically all of which have been moved as intra-state business, I am of the opinion that the figures that I formerly gave are correct and are sustained by the percentages obtained in more recent months, and that the increase of intra-state business due to the construction of the Tidewater Railway easily accounts for the slight excess of percentage which the four months show over the percentage formerly testified to by me.

2. Again, in my former testimony, I attempted to give the in-

crease in cost of doing business on the Norfolk and Western road for the year 1906 over the cost incurred during the year 1905, the figures of which year had been used by me in the investigation. I was not able to give the percentage of increased cost on the major portion of the items which go into the construction and operation of a railroad but I have since that time examined into this increased cost and I attach hereto a statement of the unit prices of the majority of the articles which are ordinarily used in the construction and maintenance of our road as of December, 1904, and December, 1906, and have shown in the last column the percentage of increase in respect to the various items therein listed.

Also, as a part of the same paper I have shown the percentage of increased cost of the larger portion of the labor that is necessary in the operation of the road whereby it appears that the cost of labor for the year 1906 was $400,000 more than the cost for the same service for the year 1905, and that under the increased wages which have become necessary and which became effective on the 1st day of February, 1907, the cost for the year beginning February 1st, 1907, will be $471,000 for the same service in excess of what the same service cost in the year 1906. When I use the term "same service", I wish it understood to mean practically the same service, for, as matter of fact, in the foregoing figures there is necessarily
160 included such additions to the service as the growth of the road requires, but, in considering the whole, the item of additional labor is comparatively a slight one and would be exceedingly difficult to separate with absolute accuracy. The above figures refer to the cost of labor for the entire system.

3. Again, the taxes paid by this Company to the State of Virginia and its Cities and Counties for the year 1904, which was the tax year which entered into the figures which I have heretofore furnished to the Commission, aggregated the sum of $437,000; whereas the taxes for the year 1906 aggregated the sum of $512,000, being an increase of 17%.

During the period that this investigation has been going on the gross earnings of this Company has increased, but the fact that the net results from such gross earnings have not been sufficient to keep pace with the excess cost in every direction to which this Company has been subjected, is shown by the fact that although the gross earnings of this Company, from the 1st day of July, 1906, to the 31st day of January, 1907, increased $1,382,000 over the corresponding period of the preceding year, yet the net earnings during that period only increased $1,160; and, by reason of increased fixed charges and increased taxation, the net surplus of this Company decreased, from the 1st day of July, 1906, to the 31st day of January, 1907, the sum of $313,753.

In arriving at the figures just above given, I have made up the accounts upon the same basis upon which the accounts for the year ending June 30th, 1905, which already have been testified to and analyzed by me in my testimony before the Commission, were made up, making the same class of charges against gross income and adopting exactly the same method of accounting, except that I have not

entered, in this account any charge against gross income on account of payment for extraordinary expenses of operation, sometimes known as betterments. The reason that this item does not appear against the gross income is due to the fact that the item of betterments is, under our system of accounting, not charged up against the gross income until the end of the year when all of this class of accounts are reviewed and charged up.

In the event that the item of betterments had been charged against gross income at this time, the amount of the decrease in our surplus would be much larger than the amount now given and, at
161 the end of our fiscal year, when this item will be charged against our income, the surplus will show a much more marked decrease than is now apparent.

4. As a part of this affidavit, I attach "Exhibit, JWC No. 1", showing, in parallel columns, the unit process of costs of material for the year December, 1904, and December, 1905, with the percentage of increase; and also "Exhibit JWC No. 2", being printed slip issued by me, which is the financial exhibit of the Company prepared by me and issued from month to month.

And further this deponent sayeth not.

JOS. W. COXE,
Comptroller, Norfolk & Western Ry. Co.

Subscribed and sworn to before me, this the 29th day of March, 1907.

JULIAN H. RUTHERFOORD,
Notary Public.

My Commission expires Dec. 10, 1908.

162 EXHIBIT JWC No. 1.

Norfolk and Western Railway Co.

Virginia Classification Case.

Virginia 2-Cent Passenger Rate Case.

The testimony in the Freight Classification case and 2-cent Passenger Rate case were both based upon accounts for the year ending June 30th, 1905. Since that date marked increases have been effected in the prices paid by the Railway Co. for both labor and material.

The comparative prices prevailing on leading items of material were:—

	December, 1904.	December, 1906.	Increase.
Axles	$1.70	$2.25	32%
Bar Iron	1.50	1.75	14%
Bar Steel	1.40	1.68	20%
Beams	1.50	1.88	25%
Channels	1.50	1.88	25%
Angles	1.50	1.88	25%
Pig Iron, No. 2 Foundry	13.50	14.50	7%
Pig Iron, Charcoal	16.00	22.00	38%
Plates, Steel	1.50	1.60	7%
Rails	28.00	28.00	..
Angle Bars	1.30	1.50	15%
Track Bolts	2.15	2.60	21%
Spikes	2.01–½	2.03	1%
Copper, pig	26.00	25.00	Dec. 4%
Coal (Bit.) C. C. & B.	.85	.85	..
" " Hull	.85	.85	..
Georgia Yellow Pine	13.00	22.00	69%
Virginia " "	8.00	12.00	50%
Oak	13.00	16.00	23%
Cross Ties	.38	.54	42%

Exhibit J W C No. 1. Julian H. Rutherfoord, N. P.

163 EXHIBIT JWC No. 1.

Effective February 1st, 1906, increases were granted in rates per mile, per trip, and overtime, for Engineers and Firemen on road and yards and Conductors. Similarly, effective March 1st, 1906, increases were granted to Baggagemen, Brakemen and Telegraph Operators. Similarly, effective June 1st, 1906, Foremen, Laborers.

As a result of these increases, the cost of service per engine mile is 15% higher in January, 1907, than in 1905.

In addition to the foregoing, further demands are made by various classes of labor, effective February 1st, 1907:

Enginemen receiving increases averaging	8%
Trainmen " " "	11%
Yardmen " " "	13%
Station Agents and Operators "	19%

The approximate annual increase effective February 1st, will be $471,000.00, whilst the increase granted in 1906 will run over $400,000.00.

The taxes paid the State of Virginia for 1906 are $512,000 as compared with the 1904 taxes, $437,000, or an increase of 17%.

Exhibit J. W. C. No. 1. Julian H. Rutherfoord, N. P.

164

Form Compt. 22.

Norfolk and Western Railway Company.

ROANOKE, VA., *March 2nd*, 1907.

Statement of Earnings and Expenses for Month of January, 1907.

	1907.	1906.	Inc. or dec. in 1907.
Miles operated	1876	1848	Increase 28.
Earnings.			
Passenger, Mail and Express	$376,676.22	$320,758.80	Inc., $55,917.42—17 per ct.
Freight	2,182,658.03	2,054,870.15	Inc., 127,787.88— 6 per ct.
Total Earnings	$2,559,334.25	$2,375,628.95	Inc., $183,705.30 — 8 per ct.
Operating Expenses.			
Maintenance of Way and Structures	$314,252.95	$237,417.14	Inc., $76,835.81
Maintenance of Equipment	453,107.95	401,073.61	Inc., 52,034.34
Conducting Transportation	783,815.39	701,325.31	Inc., 82,490.08
General Expenses	49,132 76	44,903.86	Inc., 4,228.90
Total Expenses	$1,600,309.05	$1,384,719 92	Inc., $215,589.13—16 per ct.
Net Earnings	$959,025.20	$990,909.03	Dec., $31,883.83— 3 per ct.
Deduct Fixed Charges and Taxes	402,540.00	334,206.68	Inc., 68,333.32
Surplus	$556,485.20	$656,702.35	Dec., $100,217.15
Proportion of Expenses to Gross Earnings	63 per cent.	58 per cent.	

For 7 Months—July 1st to January 31st.

	1907.	1906.	Inc. or dec. in 1907.
Average miles operated	1875	1848	Increase 27.
Earnings.			
Passenger, Mail and Express	$3,005,743.47	$2,520,603.55	Inc., $485,139.92—19 per ct.
Freight	14,639,271.08	13,741,903.11	Inc., 897,367.97— 7 per ct.
Total Earnings	$17,645,014.55	$16,262,506.66	Inc., $1,382,507.89— 9 per ct.
Operating Expenses.			
Maintenance of Way and Structures	$2,362,201.54	$2,001,775.74	Inc., $360,425.80
Maintenance of Equipment	2,993,428.73	2,681,748.49	Inc., 311,680.24
Conducting Transportation	5,397,987.00	4,704,175.58	Inc., 693,811.42
General Expenses	315,000.94	299,570.65	Inc., 15,430.29
Total Expenses	$11,068,618.21	$9,687,270.46	Inc., $1,381,347.75—14 per ct.
Net Earnings	$6,576,396.34	$6,575,236.20	Inc., $1,160.14— —
Deduct Fixed Charges and Taxes	2,674,668.89	2,359,755.01	Inc., 314,913.88
Surplus	$3,901,727.45	$4,215,481.19	Dec., $313,753.74
Proportion of Expenses to Gross Earnings	63 per cent.	60 per cent.	

JOSEPH W. COXE,
Comptroller.

J. W. C. Exhibit 2. Julian H. Rutherfoord, N. P.

165 *Temporary Restraining Order.*

Entered and Filed May 15th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

Upon reading the verified bill in this cause, and upon its being made to appear to the Court that there is danger of irreparable injury to the complainant from delay, unless the acts sought to be enjoined herein are restrained until a hearing upon the motion for an injunction in this cause, it is now ordered:

1. That the defendants, Beverley T. Crump, Henry C. Stuart, and Joseph E. Willard, constituting the State Corporation Commission of Virginia, and each and all of their successors in office, their and each of their servants, agents and employees, be, and they are, hereby restrained and enjoined from publishing, or having published, in any newspaper published in the City of Richmond, the general order of the State Corporation Commission bearing date the twenty-seventh day of April, 1907, in respect to passenger rates, in the bill in this cause mentioned, and from taking any other step or steps whatsoever under the Constitution or laws of Virginia to enforce the requirements of the said order.

2. That the defendant R. T. Wilson, Clerk of the State
166 Corporation Commission, and his successors in office, and his agents, servants and employees, be, and they are, hereby restrained and enjoined from publishing or having published the said order of the State Corporation Commission in any newspaper published in the City of Richmond, Virginia.

3. That the owner, proprietor, or manager, or agent of any such owner, proprietor or manager, of any newspaper in the City of Richmond, Virginia, be, and each and every one of them is, hereby restrained and enjoined from publishing, or having published, under the direction of the State Corporation Commission, or of the Clerk thereof, such order of the State Corporation Commission.

4. That the defendants and each of them show cause before this court in the United States Court Room at Asheville, N. C. at ten o'clock a. m. on Thursday, the 27th day of June, 1907, why an injunction *pendente lite*, as prayed in the bill, should not be issued, and that a copy of this order be served as soon as practicable upon each of the defendants.

5. That this restraining order shall be in force and effect from the date hereof, and until the determination of the complainant's motion for an interlocutory injunction herein; provided, however, that upon the failure of the complainant or some one for it, to execute, within ten days from this date, a bond in a penalty of Ten Thousand Dollars, payable to the defendants, with surety approved by

one of the judges of this court, and conditioned substantially as hereinafter mentioned, the said restraining order shall stand dissolved. The condition of said bond shall be substantially as follows:

"The condition of the above obligation is such that

Whereas a restraining order has been made in the above entitled cause, by the terms of which the defendants, and each
167 of them, are restrained, until an application for an interlocutory injunction herein shall be determined, from doing or causing to be done, certain acts mentioned in said restraining order; now should said restraining order be dissolved or vacated as having been wrongfully issued or because the said acts were improperly restrained, then that the above-named Norfolk and Western Railway Company shall pay, or cause to be paid, all damages caused by the issue of said restraining order and the costs of this cause in connection therewith."

6. That, if for any reason the determination of the motion for an injunction *pendente lite* be not made until after July 1, 1907, the date fixed in the said order of the State Corporation Commission of Virginia for the rates thereby prescribed to go into effect, then the complainant shall, prior to that date, apply to this court, or a judge thereof, for an order directing the giving of a bond by the complainant as prayed for in the thirteenth paragraph of the bill in this cause, to secure the payment into the registry of this court, in case the said order of the Commission herein complained of is in this cause finally declared valid and constitutional, of the excess which the complainant may receive on business covered by said order, over the amount it would have been entitled to receive on the basis of charges fixed by said order.

May 15th, 1907.

J. C. PRITCHARD,
United States Circuit Judge.

And thereupon came the above named complainant and filed the bond as provided in this order, which bond was this day ap-
168 proved by a judge of this court as a full compliance with the provision thereof requiring the giving of a bond.

May 15th, 1907.

J. C. PRITCHARD,
United States Circuit Judge.

Marshal's Return.

Executed May 15th, 1907, by delivering in person to R. T. Wilson at the office of the State Corporation Commission of Virginia in the City of Richmond, Va., a true copy of this order, and further executed on the 16th day of May 1907, by delivering in person to Beverley T. Crump and Henry C. Stuart at the office of the State Corporation Commision of Virginia in the city of Richmond, Va., and to J. St. George Bryan in person at the office of the Richmond Times-Dispatch Company in the city of Richmond, Va., the said

J. St. George Bryan being the Secretary and Treasurer of the said Richmond Times-Dispatch Company, the President of the said Richmond Times-Dispatch Company not being found, and to Alfred B. Williams in person in the city of Richmond, Va., at the office of the News-Leader a newspaper published in the city of Richmond, Va., he being the President of the said News Leader, and to Charles B. Cooke in person in the city of Richmond, Va., at the office of the Evening Journal a newspaper published in the city of Richmond, Va., he being the President of the said Evening Journal, to each a true copy of this order, and further executed on the 23rd day of May 1907, by delivering in person to Joseph E. Willard at the office of the State Corporation Commission in the city of Richmond, Va., a true copy of this order.

MORGAN TREAT,
United States Marshal.

169 *Bond.*

Filed May 15th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

Know all men by these presents, That Norfolk and Western Railway Company, a corporation of the State of Virginia, the principal office of which is in the City of Roanoke in said State, as principal, and The United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the defendants, Beverley T. Crump, H. C. Stuart, Jos. E. Willard and R. T. Wilson in the just and full sum of Ten Thousand Dollars, for the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents.

Signed with our seals and dated this Fifteenth day of May in the year 1907.

The condition of this obligation is such that

Whereas a restraining order has been made in the above entitled case by the terms of which the defendants, and each of them, are restrained until an application for an interlocutory injunction herein shall be determined, from doing or causing to be done certain acts mentioned in said restraining order; now should said restraining order be dissolved or vacated as having been wrongfully
170 issued, or because the said acts were improperly restrained, then, if the above named Norfolk and Western Railway Company shall pay or cause to be paid all damage caused by the issue of said restraining order and the costs of this cause in connection therewith, this obligation to be null and void: otherwise to be and remain in full force and effect.

In testimony whereof the parties hereto have caused these presents to be duly signed in their respective names and their respective seals to be hereunto affixed, duly attested, this Fifteenth day of May in the year 1907.

[Seal of Norfolk and Western Railway Company.]

NORFOLK AND WESTERN RAILWAY COMPANY,
By WM. G. MACDOWELL, *Vice-President.*

Attest:
H. W. GRIFFITH,
Ass't Secretary.

[Seal of the United States Fidelity & Guaranty Company.]

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By E. LESLIE SPENCE, JR., *Att'y in Fact.*

Approved as a full compliance with the provisions of the restraining order entered in this cause on the 15th day of May, 1907, requiring the giving of a bond.

J. C. PRITCHARD,
U. S. Circuit Judge.

This 15th day of May, 1907.

171 *Chancery Subpœna.*

UNITED STATES OF AMERICA, *Eastern District of Virginia, ss:*

The President of the United States of America to Beverley T. Crump, Henry C. Stuart, Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of the State Corporation — of Virginia, Greeting:

We command you, and every one of you, that you appear before our judges of our Circuit Court of the United States of America, for the Eastern District of Virginia, at the Court Room in the Custom House in the City of Richmond, in said District, on the first Monday in the month of July next, to answer the Bill of Complaint of Norfolk and Western Railway Company this day filed in the Clerk's Office of said Court, in said City of Richmond, then and there to receive and abide by such judgment and decree, as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Eastern District of Virginia to execute:

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Richmond aforesaid, this 15th day of May, in the year of our Lord one thousand nine hundred and seven, and of our Independence the 131st.

[Seal of United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY, *Clerk.*

172 MEMORANDUM.—The above-named defendants are notified that unless they enter their appearance in the Clerk's Office of said Court, at Richmond aforesaid, on or before the day to which the above writ is returnable, the Complaint will be taken against them as confessed, and a decree entered accordingly.

JOSEPH P. BRADY, *Clerk.*

Marshal's Return.

Executed May 15th, 1907, by delivering in person to R. T. Wilson at the office of the State Corporation Commission of Virginia in the city of Richmond, Va., a true copy of this subpœna together with a certified copy of the Bill of Complaint filed in this cause, and further exectued May 16th, 1907, by delivering to Beverley T. Crump and Henry C. Stuart at the office of the State Corporation Commission of Virginia in the city of Richmond, Va., a true copy of this subpœna together with a certified copy of the Bill of Complaint filed in this cause, and further executed May 23rd, 1907, by delivering in person to Joseph E. Willard at the office of the State Corporation Commission of Virginia in the City of Richmond, Va., a true copy of this subpœna together with a certified copy of the Bill of Complaint filed in this cause.

MORGAN TREAT,
United States Marshal.

173 *Joint and Separate Answer of Defendants to Rule to Show Cause Why a Temporary Injunction be Not Awarded.*

Filed June 27th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, Complainant,
v.
BEVERLEY T. CRUMP, H. C. STUART, and JOSEPH E. WILLARD (Individually and as Constituting the State Corporation Commission of Virginia) and R. T. WILSON (Clerk of the State Corporation Commission), Defendants.

Joint and Separate Answer of said Defendants to a Rule to Show Cause Why a Temporary Injunction be Not Awarded.

The joint and separate answer of the above named defendants to a rule, heretofore awarded in this cause and duly served upon
174 them, requiring them, and each of them, to show cause, before this court, in the United States court-room at Asheville, North Carolina, at 10 o'clock a. m., on the 27th day of June, 1907, why an injunction *pendente lite*, as prayed in the bill of the above named plaintiff, should not be issued.

These respondents (saving and reserving to themselves, jointly and separately, the right to all just and proper exceptions and defenses

which they, or any of them, have, or may have, to this cause, either as to the form or as to the substance thereof, and without waiving any valid objection, or objections, which they, or any of them have, or may have, to the jurisdiction of this Honorable Court in this cause, but, on the contrary, expressly denying any such jurisdiction), for answer to said Rule, say:

First. That said city of Asheville, in the State of North Carolina, was and is beyond the territorial jurisdiction of this Honorable Court; and, therefore, as said defendants are advised and respectfully insist, this Honorable Court cannot lawfully assemble, convene, sit, receive or hear answers, motions or pleadings of the litigants in this cause, nor take any action whatever therein, at the said city of Asheville, and that this Honorable Court, and each of the Honorable Judges thereof, was and is without jurisdiction to issue said Rule, or any Rule whatsoever, returnable before this Honorable Court at said city of Asheville; and said defendants are advised and respectfully insist that, for these reasons, said Rule was and is void and of no effect, and that these defendants ought not, nor, ought any of them, to be held or required to further answer the same.

Second. That the said defendants, Beverley T. Crump, H. C. Stuart, Joseph E. Willard, and R. T. Wilson, have not, nor hath either of them, any personal, private or individual interest in, or connection with, the subject matter of this suit; but, on the contrary, none of them ever was interested therein, or connected therewith, except in his public and official capacity and character, as

175 follows: The said Crump, Stuart and Willard, at the time of the institution of this suit, constituted the State Corporation Commission of Virginia, a Department of the Government of that State, as hereinafter more fully set forth, and the said R. T. Wilson was the Clerk of said Commission; and it is only in their respective public and official characters or capacities as Members and Clerk of said Commission that said defendants, or any of them, ever were interested in, or connected with, the subject matter of this suit—the acts, against which an injunction is prayed for in the Bill, being acts which could not possibly be performed by said defendants, or any of them, except in their said official capacities or characters, and not otherwise. The said State Corporation Commission is one of the principal Departments of the Government of the State of Virginia, and was created and established, and its functions, powers, duties and methods of procedure prescribed and provided for, by the Constitution and Statutes of said State, as will more fully appear from the One Hundred and Fifty-fifth Section, and the One Hundred and Fifty-sixth Section of the Constitution of the said State, and from the Act of the General Assembly of said State, entitled:

"An Act to put into effective operation the provisions of the Constitution relating to the creation, appointment, and organization of the State Corporation Commission, its jurisdiction, powers and duties; the qualification of its members and officers thereof, their appointment and salaries; the location of its offices and places and times of its public sessions; *its writs, processes, orders, findings and judg-*

ments; appeals from its orders, findings, and judgments and its expenses, &c.",

which was approved April 15th, 1903; of which said constitutional provisions and statute, complete copies, duly certified by the Secretary of the Commonwealth of Virginia, under the Lesser Seal of said Commonwealth, are filed, and prayed to be taken and read
176 by this Honorable Court, along with, and as parts of, this answer, said copies being marked, respectively, "Defendants' Exhibit No. 1", and "Defendants' Exhibit No. 2". The said constitutional provisions and statute, as set forth in said copies thereof, together with two other statutes of said State, of which true copies, similarly certified, are herewith filed, marked respectively, "Defendants' Exhibit A", and "Defendants' Exhibit B", and prayed to be taken and read as parts of this answer, are (as set forth in said certificates of the Secretary of the Commonwealth attached to said copies) still in full force and effect, and have been so continually since prior to January 1st, 1904, and these defendants aver that they represent the entire constitutional, and statutory, provisions of the State of Virginia on the subject, in effect from January 1st, 1904, to the present time. From these constitutional, and statutory, provisions it will clearly appear, as these defendants respectfully submit, that (except in certain cases of mandamus or prohibition) said State Corporation Commission has no more power, under the laws of Virginia, of suing or being sued, or of pleading or of being impleaded, in any court of law or chancery, than has the General Legislature, or Supreme Court of Appeals, of that State. In view, therefore, of the matters and things set forth and referred to in this Clause Second of their Answer to said Rule, these defendants are advised and respectfully insist, that this suit is such a suit against the State of Virginia, as this Honorable Court was, and is, without jurisdiction to entertain, or to enter any order or decree, or to take any other action therein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Third. That, in the said proceedings before the State Corporation Commission of Virginia, in which said order of April 27th, 1907, was entered, the Commonwealth of Virginia was required by law to be the plaintiff, and, as a matter of fact, was the plaintiff therein, both in form and in substance; that, by the said Constitution and laws of Virginia, an appeal can be taken from said order of
177 April 27th, 1907, to the Supreme Court of Appeals of Virginia, by the Commonwealth of Virginia, as appellant, or it can be taken by the said plaintiff herein, as appellant, in which latter case, however, it is provided and required by the said Constitution and laws of Virginia, that the said Commonwealth of Virginia must be made the appellee; and these defendants are advised and respectfully insist that this proceeding now here pending, to suspend and set aside, or, at any event, to review the said order of April 27th, 1907 (in which the Commonwealth of Virginia is plaintiff, as aforesaid, from which the said Commonwealth of Virginia may take an appeal, as aforesaid, and from which the said plaintiff herein can

also take an appeal, as aforesaid, but only by making the said Commonwealth of Virginia the appellee therein), is in substance and effect such a suit against the Commonwealth of Virginia as this Court is without jurisdiction to entertain; therefore, and for this reason also, these respondents are advised and respectfully insist that this Honorable Court was, and is, without jurisdiction to entertain this suit, or to enter any order or decree, or to take any other action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Fourth. That, on the first day of June, 1907, the said Beverley T. Crump, who, up to that time, had been a Member, and the Chairman of the said State Corporation Commission of Virginia, did (pursuant to his previous resignation) retire from said Commission and cease to be the Chairman, or a Member thereof; that, thereupon, his place as a Member of said Commission was forthwith filled by the Honorable Robert R. Prentis, who had been duly appointed, according to law, by the Honorable Claude A. Swanson, Governor of Virginia, to fill the vacancy caused by the said resignation of said defendant Crump, and who has duly qualified as a Member of said Commission according to law; that, upon so taking office as a Member of said Commission, the said the Honorable Robert R. Prentis, was,

178 by the Members of said Commission, duly elected, according to law, Chairman of said Commission, and forthwith qualified as such, since which time, to-wit, since the first day of June, 1907, the said Commission has continuously been, and still is, composed of the said the Honorable Robert R. Prentis and said defendants Stuart and Willard, as the sole Members thereof, the said Prentis being the Chairman of said Commission, as aforesaid; that said Crump, having, on June 1st, 1907, ceased, as aforesaid, to be a Member of the said Commission, has not been at any time since the 1st day of June, 1907, in any manner whatsoever, connected with said Commission, and, therefore, is no longer interested in, or in any way connected with, the subject matter of this suit; and said defendant Crump, having, by said termination of his connection with said Commission, become incapable of performing, or of, in any manner, controlling or participating in, any of the acts against which said injunction is prayed for, he is advised and respectfully insists that, in any event, this suit should be no longer maintained as to him, and that he should accordingly be hence dismissed as one of the defendants herein.

Fifth. That the said defendants have not, nor have any of them, any personal, private or individual interest in or connection with, *with* the subject matter of this suit, but are only interested therein, or connected therewith, in so far as they constitute the State Corporation Commission of Virginia and the Clerk of said Commission; that the said State Corporation Commission of Virginia was created and established, and its functions, powers, duties and procedure prescribed and provided for, by the Constitution and Statutes of said State, as will more fully appear from the One Hundred and Fifty-fifth Section, and the One Hundred and Fifty-sixth Section, of the

Constitution of said State, and from the Act of the General Assembly of said State, entitled:

"An Act to put into effective operation the provisions of the Constitution relating to the creation, appointment and organization of the State Corporation Commission, its jurisdiction, powers
179 and duties; the qualification of the Members and officers thereof, and their appointment and salaries; the location of its offices and places and times of its public sessions; *its writs, processes, orders, findings and judgments; appeals from its orders, findings, and judgments, and its expenses, &c.*."

which was approved April 15th, 1903; of which said constitutional provisions and statute, complete copies, duly certified by the Secretary of the Commonwealth of Virginia, under the Lesser Seal of said Commonwealth, are (as heretofore stated) filed, and prayed to be taken and read by this Honorable Court, along with, and as parts of, this Answer—said copies being marked, as aforesaid, "Defendants' Exhibit No. 1" and "Defendants' Exhibit No. 2," respectively; that the said constitutional, and statutory, provisions, as set forth in said copies thereof, are, together with said other two statutes of said State, of which true copies, similarly certified, are (as heretofore stated) filed with this answer, marked, respectively, "Defendants' Exhibit A" and "Defendants' Exhibit B," and prayed to be taken and read as parts of this Answer, (as set forth in said certificates of the Secretary of the Commonwealth, attached to said copies) still in force and effect, and have been in full force and effect continuously since prior to the first day of January, 1904, and these defendants aver that they represent the entire constitutional, and statutory, provisions of the State of Virginia on the subject, in effect from the first day of January, 1904, to the present time; that, on the 6th day of October, 1903, Rules of Order, Practice and Procedure before the said State Corporation Commission of Virginia were duly made and prescribed by said Commission and entered upon the records of its proceedings and printed and distributed according to law; that a full, complete and true copy of said Rules of Order, Practice and Procedure, as they have existed since the first day of January, 1904, to the present time, and still exist, duly certified by the Chairman and Clerk of said Commission under the seal of said Commission, and further veri-
180 fied by the affidavit of said R. T. Wilson, is filed, and prayed to be taken and read by this Honorable Court, along with, and as a part of, this Answer—the said copy being marked "Defendants' Exhibit No. 3"; that the proceedings before the said State Corporation Commission which are referred to in the plaintiff's Bill, and in which the said order in respect to the passenger rates of the plaintiff was entered by the said Commission on the 27th day of April, 1907, were taken and had before the said Commission in strict conformity, in every respect, with the provisions hereinbefore mentioned of the Constitution and Statutes of the State of Virginia, and with the said Rules of Order, Practice and Procedure before the said State Corporation Commission; that the initial step in said proceedings was, as set forth in the Bill herein, a Notice, of which the following is a copy:

"*Notice.*

Office of the State Corporation Commission.

RICHMOND, VA., 31*st Day of July,* 1906.

To the Several Steam Railroad Companies Doing Business in Virginia and all Persons Interested:

Take notice that the State Corporation Commission will, in the city of Richmond, on Thursday, the first day of November, 1906, at 12 o'clock, noon, in accordance with the authority conferred by the Constitution of Virginia and the statutes enacted by the General Assembly of Virginia pursuant thereto, hear and consider any objections which may be urged against a rule, regulation, order or requirement of the Commission fixing and prescribing a maximum rate of charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one railroad company, or joint transportation over the
181 lines of two or more companies; and whether the contract for transportation of a passenger or passengers be evidenced by an ordinary ticket between stations, by a mileage book or otherwise; the Commission to have, as authorized by law, the power and authority from time to time, and as often as circumstances may require, to change or revise the rate, or, by rules, regulations and requirements, to provide for the more convenient and expedient putting into effect and proper observance of said maximum rate. At the said hearing and consideration of the said maximum rate of two cents per mile, the method, time and extent of promulgation and putting into effect of the same will be heard and determined by the Commission, to the end that a maximum rate for passenger transportation may be put into effect and be made applicable to all steam railroad companies doing business in Virginia, and be properly observed by them in the transportation of passengers.

BEVERLEY T. CRUMP, *Chairman;*
H. C. STUART,
JOSEPH E. WILLARD,
Commissioners."

That said Notice was forthwith duly published according to law once a week, for four consecutive weeks, in the Times-Dispatch, a newspaper of general circulation published in the city of Richmond; that, in accordance with said Notice the said plaintiff herein appeared before the said State Corporation Commission of Virginia at the time and place fixed by said Notice, to-wit, on the first day of November, 1906, at 12 o'clock, noon, at Richmond, Virginia, and filed its Answer, a copy of which is filed with the Bill in this cause, marked "Exhibit C"; that in its said Answer, as will be more fully seen from said "Exhibit C" with the plaintiff's Bill herein, the following five grounds of defense were set up and relied upon (they being the

182 identical grounds (with two or three immaterial exceptions) upon which the plaintiff here seeks to attack and overthrow the order of the Commission in that proceeding), to-wit:

1st. That, because of the fact that the said Corporation Commission was clothed with Legislative, Judicial and Executive powers, its dealings with the said plaintiff herein, in respect to the regulation of its rates, would not amount to *due process of law;* and that, for the same reason, said plaintiff herein, if compelled to submit to the jurisdiction of said Commission in the premises, would be denied the *equal protection of the laws;*

2nd. That, by reason of certain previous Acts of the General Assembly of Virginia, that State could not, through any instrumentality, regulate the rates of said plaintiff herein, under existing conditions, without *impairing the obligation of the State's alleged Contract with said Company;*

3rd. That *any* regulation of the intra-state passenger rates of said Company would, of necessity, amount to a regulation of the interstate passenger rates of said Company, in violation of the *Commerce Clause* of the Constitution of the United States;

4th. That the suggested rate would, if imposed upon the Company, be *confiscatory of its property;* and

5th. That the existing rates of the Company were *fair and reasonable.*

That, thereupon, the said Commission entered into a most elaborate consideration and investigation of each of the questions of law and of fact raised by said Notice and said Answer; that, as will more fully appear by the affidavit of the said R. T. Wilson,

183 Clerk of said Commission, herewith filed, and prayed to be taken and read by this Honorable Court along with, and as a part of this Answer, marked "Defendants' Exhibit No. 4," the Commission spent many days in the hearing of the matters involved in said Notice and Answer, at which hearing the said complainant herein appeared and made an elaborate defense, introducing testimony covering several thousand pages of record; that said hearing was not concluded until the said plaintiff herein had, through its counsel, announced that its case was complete; that, after the said hearing had concluded, to-wit, on the 27th day of April, 1907, said State Corporation Commission entered its order in said proceedings fixing the maximum rates of the said plaintiff herein for the transportation of passengers in its intra-state Virginia business, which order is set out at length in the plaintiff's Bill, but, at the time of entering said order, and along with the same, and as a part of the official and legal record of said proceedings, the said Commission filed an elaborate opinion which thereby became, and was, and still is (in accordance with law), a part of the official record of said proceedings, a true copy of which opinion will be found in the copy of said official record hereinafter filed, marked "Defendants' Exhibit No. 5," and is prayed to be taken and read by this Honorable Court, along with, and as a part of this Answer; that, in accordance with the requirements of law, and of the uniformly established custom and practice in all such cases, a written record of all the proceedings (except the evidence) in said matter, from its incep-

tion up to and including said order of April 27, 1907, was duly made in the regular official "judicial order book" of the Commission by its Clerk and signed by its Chairman in exactly the same manner in which records of their proceedings are made, verified and preserved by the ordinary judicial courts of the State of Virginia; that the said "judicial order book" of the Commission and its contents are public records under the laws of Virginia just as are the order books of ordinary judicial courts of that State—said record, however, in its present shape does not now include the evidence in the cause,

184 but all the documents and all oral testimony (of which latter a complete stenographic report is preserved by the Commission) constituting such evidence *is* in the custody of the Commission, and preserved by it to be hereafter made a part of the record and as such to be duly certified by the Commission along with the other parts of the record, to the Supreme Court of Appeals of Virginia, upon the taking of an appeal from said order of April 27, 1907, in case such appeal be taken; that a complete and true copy of the record of said proceedings, as it appears upon said judicial order book of the Commission (verified by the affidavit thereto attached of said R. T. Wilson, Clerk of said Commission) is herewith filed, marked "Defendants' Exhibit No. 5," and is prayed to be taken and read by this Honorable Court along with, and as a part of, this Answer; that, as above stated, all of the documentary evidence, and a full stenographic report of all the oral testimony adduced in said proceedings—amounting to several thousand pages—*is* preserved by the Commission in its archives ready to be made a part of the record of said proceedings and certified as such, by the Commission, according to law, along with the residue of the record of the case, to the Supreme Court of Appeals of Virginia, upon an appeal to that tribunal from the said proceedings before said Commission, including its said final order therein of April 27, 1907, which appeal, either the Commonwealth, or said plaintiff Company herein, may, as aforesaid, under the express provisions of the laws of Virginia, take as of right, but which neither has yet taken nor applied for; and said defendants say that the said State Corporation Commission of Virginia was, and is, and always has been (particularly with respect to the said order of April 27, 1907, and the said proceedings in which said order was entered), a "court" of the State of Virginia, within the true meaning, purport, intent and purview of Section 720 of the Revised Statutes of the United States, which provides, that,

"A writ of injunction shall not be granted by any court of the United States to stay proceedings in *any* court of a State, ex-

185 cept in cases where such injunction may be authorized by any law relating to proceedings in Bankruptcy";

and that this suit is not a case within the exception specified in the said Section 720 just quoted. Therefore, and because of the matters and things set forth or referred to in this Fifth Clause of this Answer, these defendants are advised and respectfully insist that this Honorable Court is without any jurisdiction to entertain this suit, or to enter any decree or order, or to take any other action, herein (save to dismiss the suit), because, as these defendants insist the sole

object of this suit, and the sole ground upon which the equitable interference of this court is prayed, is the obtaining of an injunction which, if obtained, would be, (as these defendants are advised and respectfully insist) in violation of the express provisions of the said statute of the United States last above mentioned; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer in this cause;

Sixth. That, under the Constitution and laws of the State of Virginia, as set forth in the Exhibits herewith filed, the State Corporation Commission of Virginia is expressly made a judicial court for the enforcement, by its own appropriate process, of compliance with the requirements of its said order of April 27th, 1907; and it is not requisite, necessary nor appropriate for the said Commission to bring suit, nor has it the power of suing, in any other tribunal, for the enforcement of any of its orders, nor is the said Commission, in the supervision, regulation or control of Railroad Companies, authorized, to prosecute or defend litigation of any kind, in any tribunal, for any purpose. Therefore, and for this reason also, these defendants are advised and respectfully insist that the injunction prayed for in the plaintiff's Bill to restrain the said Commission and its members from taking any steps to enforce the said order of April 27th, 1907, would, if granted, have only the effect of restraining and enjoining a judicial court of the State of Virginia from en-
186 forcing by its own appropriate process, compliance with an order theretofore issued by it within the limits of its jurisdiction, and from which no appeal lies to this court, and over which this court has no power of review; these respondents, therefore, respectfully insist that this Court was, and is, without jurisdiction to entertain this suit, or to enter any order or decree, or to take any other action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Seventh. That no persons are, or can be, impleaded in this cause with whom the plaintiff herein may legally or properly litigate the question of the reasonableness or validity of the rates imposed upon the plaintiff by said order of April 27th, 1907. These defendants have not, nor have any of them, any personal, private, or individual interest in that question, which would authorize them as individuals to litigate the same, nor are they, or any of them, by law, charged with the duty, or clothed with the power, in any official or public capacity or character, of conducting or defending any such litigation in any court whatsoever; the said State Corporation Commission, as a public body, in the exercise of its power under said constitutional provisions, is wholly without any power or authority of law to prosecute or defend suits, actions, or proceedings of any kind, or to appear as a suitor for any purpose, in any court whatsoever,—as much so as is the Supreme Court of Appeals, or the General Assembly, of Virginia; and, finally, the Commonwealth of Virginia has not consented to be impleaded in this Honorable Court for the purpose of litigating the question of the reasonableness or legality of the said rates prescribed by the said order of April 27th, 1907. Therefore, for this reason also, these defendants are advised

and respectfully insist, that this Honorable Court is without jurisdiction to entertain this suit, or to enter any order or decree, or to take any further action therein, except to dismiss the same;
187 and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Eighth. That before said hearing was concluded by said Commission in said proceedings, to-wit, on March 16th, 1907, the Commission gave a written notice to each of the counsel, of record in said proceedings, for the Railroad Companies which had appeared therein, including the plaintiff herein, said notice being in the form of a letter addressed by said Commission to each of said counsel by name, of the body of which letter the following is a copy:

"GENTLEMEN: We are addressing this communication to all the counsel of record in the proceedings before the Commission against the steam railroads of the State, relative to prescribing a maximum passenger rate of two cents per mile, in order to notify all counsel as follows: This proceeding will be called on Wednesday, the 27th inst. at eleven o'clock in the morning, in the court room of the Commission, at which time the hearing will be resumed and continued until completed. Counsel for the Commonwealth will be expected to be fully prepared to submit to the Commission all evidence, oral or documentary, which they may desire to put in on behalf of the Commonwealth. The defendant railroad companies will be expected to be prepared to put in any further evidence, or bring before the Commission any further fact which they may desire the Commission to consider in this proceeding. At the close of the evidence on both sides, the Commission will be prepared to hear argument on the issues arising in this proceeding, to the end that, at the sitting of the Commission, commencing on the 27th day of March, this proceeding will be carried on consecutively from day to day until concluded and submitted to the Commission for its consideration and action."

188 That accordingly, on March 27th, 1907, the Commission again assembled in public session for the final hearing of said proceeding, and after the Chairman of the Commission had read aloud at said session of the Commission, the above notice, the further taking of evidence in said proceeding was resumed, and the hearing by the Commission was not concluded until the counsel for the said plaintiff herein had announced that his client had nothing more to say or offer in its behalf; and these defendants are advised and respectfully insist, that whether the said State Corporation Commission of Virginia be regarded as a judicial, a legislative or an administrative tribunal, or as a combination of any two or more of such bodies, yet the said proceedings, which resulted in the said order of April 27th, 1907, and which are the regular proceedings prescribed by the Constitution and laws of the State of Virginia and the regularly established practice of the said Corporation Commission in all such cases, constituted due process of law as to the said plaintiff herein, within the true intent and meaning of the Fourteenth Amendment of the Constitution of the United States; and these respondents are further advised and respectfully insist that the said plaintiff herein, having been duly made a party to said proceedings,

and having appeared and made therein a full defence and submitted the matter to the Commission for its decision and action (as, these defendants aver, the said plaintiff herein did do), and the said Commission, having, thereupon, decided the questions involved in said proceedings and so submitted to it for decision, and having taken action upon the matter as set forth in its said order of April 27th, 1907, the said plaintiff herein thereupon became, was, and is, bound by that decision and action of the Commission and cannot now ignore nor disregard the same, but must appeal from it in the manner provided by law, or else abide by, and obey, it; and these defendants are further advised and respectfully insist, that this Honorable Court, being without jurisdiction to entertain an appeal from said order of April 27th, 1907, is equally without jurisdiction to ignore,
189 disregard, reverse, or overrule the same, and that to enjoin the enforcement of that order by the tribunal which entered it and which, by the laws of Virginia, is alone charged with the enforcement of that order, is tantamount to, and in substance, and effect, the same as, to ignore, disregard and overrule that order; and these defendants aver that every question of law or fact involved in this suit (except only the question of the jurisdiction of this Court) was directly involved in the said proceedings before said Commission, which culminated in said order of April 27th, 1907, and that (with two or three immaterial exceptions) every such question was expressly raised and pressed in the said proceedings by said plaintiff herein, and was considered and decided, expressly or by necessary implication, by the said Commission in the said proceedings; and these defendants aver that there was no evidence, or defence, or right, or matter, of any kind (whether legal or equitable, whether depending upon questions of law or of fact, or both, and whether arising under the Constitution and laws of the United States or otherwise), which the plaintiff herein could assert or rely upon in its behalf in this suit (if it should be proceeded with as prayed for in the plaintiff's Bill), that the said plaintiff herein did not have both the express and plain legal right to introduce and rely upon, and the fullest and fairest opportunity of introducing and relying upon, in its behalf, throughout said proceedings before said Commission which culminated in said order of April 27th, 1907, of which opportunity the said plaintiff herein most freely availed itself, without limitation or hindrance; and these defendants say, that if this suit could legally proceed, its future proceedings would and could be nothing else than a repetition of exactly the same hearing already had, upon the same evidence already adduced, and upon the same questions already decided, in said proceedings before said Commission culminating in said order of April 27th, 1907; and these defendants further aver, that the Constitution and laws of the State of Virginia make full, ample and liberal provision for an appeal of right by the said plaintiff herein, to the Supreme Court of Ap-
190 peals of Virginia, from the said decision and action of the said State Corporation Commission, and for the suspending of the operation of said order of April 27th, 1907, pending the decision of such an appeal; yet these defendants say, that the said plaintiff herein has not taken, nor applied for, any such appeal, although

there is nothing whatever to prevent, hinder, delay, or obstruct its applying for and obtaining such an appeal and in addition thereto, a supersedeas (for which, ample and liberal provision is also made by law) suspending the operation of such order pending the decision of such appeal; and these defendants are advised that, if, upon the decision of any such appeal, the said Railway Company considers that any of the rights secured to it under the Constitution and laws of the United States have been ignored or violated, or that any question, arising under the Constitution and laws of the United States and involved in said proceedings or appeal, has been erroneously decided to its detriment, by the said Supreme Court of Appeals of Virginia upon such appeal, then, and in that event, the Constitution and laws of the United States provide a plain, simple, adequate, perfect and complete remedy for the said plaintiff herein, in the form of an appeal to the Supreme Court of the United States from any such adverse decision by the said Supreme Court of Appeals of Virginia upon such appeal from the said Corporation Commission; therefore, and for these reasons also, these respondents are further advised and respectfully insist that this Honorable Court is without jurisdiction to entertain this suit, or to enter any order or decree, or to take other action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Ninth. That the said proceedings before the State Corporation Commission of Virginia, in which said order of April 27th, 1907, was entered, are not yet completed, but are still pending before that body; and these defendants are advised and respectfully insist that if said Commission be considered and treated as a court, within
191 the purview of said Section 720 of the Revised Statutes of the United States, then, and in that event, this Court is, as hereinbefore pointed out, without jurisdiction to entertain this suit, or to grant said injunction prayed for in the Bill of the plaintiff herein; and that if, on the other hand, the said Commission be regarded and treated as a legislative body, then, and in that event, this Court is equally without jurisdiction to enjoin the proceeding of such a body in the course of the enactment of a rate regulation, until such enactment is completed; and these defendants aver that, under the Constitution and laws of Virginia, the rate regulation set forth in said order of April 27th, 1907, is not a completed enactment and will not be, unless and until the publication thereof, as directed by said order, is completed, such publication being a part and parcel of the proceedings necessary for the complete enactment of the said rate regulation; therefore, and for these reasons also these defendants are advised and respectfully insist, that this Honorable Court was, and is, without jurisdiction to entertain this suit or to enter any order or decree, or to take any other action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that th-y ought not to be held or required to further answer the same.

Tenth. That the said proceedings before the State Corporation Commission, which culminated in, and included, said order of April 27th, 1907, were and are exactly the same, both as to the tribunal, and as to the methods and forms involved, as are applicable, under

the laws of that State, to all cases of a similar character, and were not different in any respect in the case of the plaintiff herein, than they were, are, and would be, under the laws of Virginia, in the case of any and every other railroad company in the State of Virginia whose rates are sought or attempted to be regulated by law; wherefore, these defendants are advised and respectfully insist that neither in the said proceedings, nor in any of them, was the said plaintiff herein denied the equal protection of the laws.

192 *Eleventh.* That, under the Constitution and laws of Virginia, as set forth in the Exhibits filed with this Answer, the plaintiff herein has a plain, complete, prompt and adequate remedy at law for the matters of which it complains in this Bill, in this, that under the said Constitution and laws, the plaintiff herein is given an appeal as of right from the said order of April 27th, 1907, to the Supreme Court of Appeals of Virginia, and is also given the right to have the operation of said order appealed from suspended, pending the decision of said appeal; and, under the Constitution and laws of the United States, the said plaintiff herein is given the further right of an appeal to the Supreme Court of the United States from any adverse decision of the said Supreme Court of Appeals of Virginia in such matters, upon any question arising under the Constitution and laws of the United States. Therefore, and for this reason also, these defendants are advised and respectfully insist, that this Honorable Court was, and is, without jurisdiction to entertain this suit or to enter any order or decree, or to take any action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Twelfth. That, as will be clearly seen from the constitutional and statutory provisions on the subject hereinbefore set forth and referred to, the State Corporation Commission of Virginia is radically and essentially different, in its character and constitution from the Railroad Commissions (under whatsoever name designated) of any other State in the Union, and from the Interstate Commerce Commission, and therefore the rules and principles of law applicable to injunctions granted by Federal Courts against regulations promulgated by the Railroad Commissions of other States, or to proceedings therein upon regulations prescribed by the Interstate Commerce Commission, can have no proper application to this case. The principal characteristic peculiar to the State Corporation Commission of Virginia is this, that it is, by the Constitution of that State, clothed

193 with all the powers, and endowed with the full nature, of an ordinary judicial court, although it has other powers and functions in addition thereto; it sits in a fixed and public place; it keeps a written public record of its proceedings, which has all the characteristics of a court record; it issues its own writs and processes, and has them served and executed by its own executive process and not otherwise; it can compel the attendance and testifying of witnesses and the production of documents; it can enter no order nor make any valid regulation against a party without first citing it to appear and otherwise proceeding against it by due process of law; it is expressly given all the powers of a court of record; it can im-

pose fines and render, and enforce by execution, judgments therefor which are recordable, and become liens like judgments of other courts; it can issue and enforce writs of mandamus and injunction; it can punish for contempt; it can enforce its own judgments and orders by its own executive process; and not othe-wise and none of its judgments or orders can be collaterally attacked in any court of said State; from all of its judgments and orders appeals lie to the Supreme Court of Appeals of the State; but to that Court only; writs of mandamus and prohibition may be issued to it by the Supreme Court of Appeals—in short, there is not an essential characteristic of an ordinary judicial court which the State Corporation Commission of Virginia does not possess. Exactly the same due process of law which would be observed, and the same procedure which would be pursued, in an ordinary judicial court of other S-ates, or of the United States, in a suit by an ordinary Railroad Commission, or by the Interstate Commerce Commission, against a railroad company to compel the observance of an *actually promulgated* rate regulation, just *such* process is observed, and just *such* procedure pursued, by the Virginia State Corporation Commission, *in limine*, with reference to a *suggested* rate regulation, in order that its fairness and reasonableness may be judicially tested, while its wisdom and propriety is being legislatively considered, *before* its promulgation and before any injury can be done or penalty incurred, rather
194 than *afterwards*. In such a proceeding, the company has exactly the same rights and protection, and may assert and rely upon exactly the same matters of law and of fact, and upon each and every of them, that it could have asserted or relied upon before an ordinary court in a proceeding taken *after* the promulgation of the rate; and from the decision by the Commission of every *judicial* question involved in such proceeding, an appeal of right may be taken (with supersedeas, if desired) by the company affected, to the Supreme Court of Appeals of the State, and thence, upon any Federal question, to the Supreme Court of the United States. Thus it will be seen that, under the Virginia law, all questions involving the legality of a given rate regulation, are to be tried and judicially determined *before* the rate goes into effect, rather than *afterwards*, and are triable, in the first instance, by a tribunal especially suited for considering and adjudging the reasonableness of rates, the members of which tribunal are experts in such matters, rather than by an ordinary judicial tribunal, whose machinery was not designed for such work, and whose judges and masters in chancery rarely, if ever, have occasion to consider such matters. After this *nisi prius* trial, the proceedings in Virginia are the same as elsewhere, that is to say, that the opportunity for appeal from the decision of such *nisi prius* court, upon any judicial question, to the Supreme Court of the State, and thence, upon any Federal question, to the United States Supreme Court, is, in Virginia, the same as, or rather more liberal than, elsewhere. The *nisi prius* proceedings in Virginia are none the less judicial proceedings because they are conducted before a tribunal especially constituted, and peculiarly fitted, for considering and disposing of such matters—its proceedings partaking, in every particular, of all the essential elements of due process of law.

For all of the foregoing reasons, these defendants are advised and again respectfully insist, that this Honorable Court is without jurisdiction to entertain this suit, or to enter any judgment or order, or to take any other proceedings herein except to dismiss the same;
195 wherefore, these defendants respectfully pray that this suit be dismissed, and that they be allowed to go hence without day, and to recover their costs against the plaintiff herein.

BEVERLEY T. CRUMP,
H. C. STUART,
JOS. E. WILLARD,
By Counsel.
R. T. WILSON.

WILLIAM A. ANDERSON,
A. CAPERTON BRAXTON,
p. d.

196 STATE OF VIRGINIA,
City of Richmond, To-wit:

This day Beverley T. Crump, to me personally known, appeared in person before me, the undersigned, a Notary Public in and for the City aforesaid, in the State of Virginia, and, before me, in my said City, subscribed his name to the foregoing answer, and made oath, then and there, that all of the statements of fact contained in said answer are true, of his own knowledge, except as to those matters therein stated on information and belief, and, as to those matters, he believes them to be true.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this, the 20th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

197 DEFENDANTS' EXHIBIT A.

(Section 19 of Chapter II of An Act Concerning Public Service Corporations, Approved January 18th, 1904.)

19. Any person or corporation aggrieved by anything done or omitted in violation of any of the provisions of this act, by any public service corporation chartered or doing business in this State, shall have the right to make complaint of the grievance and seek relief by petition against such public service corporation before the State Corporation Commission, sitting as a court of record. If the grievance complained of be established, the State Corporation Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same and to enjoin obedience to the requirements of this act, and the said commission, sitting as a court of record, shall also have jurisdiction, by mandamus, to compel any public service corporation to observe and perform any public duty imposed upon public service corporations by the laws of this Commonwealth, subject as to

any matter arising under this section to the right of appeal to the Supreme Court of Appeals by either party as of right in the mode prescribed by law, but nothing in this section shall be construed to confer any power upon the State Corporation Commission which is forbidden to the courts by section twelve of Chapter four of this act.

COMMONWEALTH OF VIRGINIA:

I, D. Q. Eggleston, Secretary of the Commonwealth of Virginia, and Keeper of the Seals thereof, do hereby certify that the foregoing is a true copy of section nineteen of Chapter II. of an act of the General Assembly of Virginia, entitled "An act concerning Public Service Corporations," approved January 18th, 1904, as the same is published according to law; that said section of said act is still in full force and effect, and has been so continuously since the last-mentioned date.

198 Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this 25th day of June, in the year of our Lord, nineteen hundred and seven.

[Lesser Seal of the Commonwealth.]

D. Q. EGGLESTON,
Secretary of the Commonwealth and Keeper of the Seals.

199 DEFENDANTS' EXHIBIT B.

AN ACT

To require the State Corporation Commission to fix and prescribe storage, demurrage and car service charges which may be collected by railroad and other transportation companies on freight transported, or to be transported by them, and to be paid by them on freight delayed and cars not promptly furnished or placed by them, with rules and regulations governing same.

Approved May 16, 1903.

1. Be it enacted by the general assembly of Virginia, That from and after the passage of this act power is hereby conferred on the State Corporation Commission of the State of Virginia, and it is required to fix and prescribe a schedule of rates for storage of freight in depots and for demurrage or car service on freight in carload lots, to be charged by railroad and other transportation companies doing business in this State, and to fix the time after the reception of freight at destination at which such charges of storage, demurrage, or car service shall begin, with power to vary the same according to the value and character of the freight stored, the nature of the place of destination, the residence of the consignee, and such other facts as, in its judgment, should be considered in fixing the same.

2. That the State Corporation Commission shall fix and prescribe a schedule of detention charges to be paid by railroad and other

transportation companies to the consignee in case of delay in the delivery of freight in carloads or less at destination, or where shipments are held an unreasonable length of time at the station or siding at which they originate, or at any intermediate point, and for carrying freights, express packages, and all other effects by and beyond the place of final destination, without authority from the consignee; and the commission shall also fix and prescribe rules and regula-
200 tions covering the placing of empty cars and a schedule of detention charges to be paid by railroad companies to consignors when cars are not placed for loading in accordance with said rules and regulations after application has been made therefor, when said charges shall, when paid, be in full of any and all claims for damages growing out of such failure: provided, however, that the owner of the freight may, at his election, waive said charges and elect to claim such actual damage as he may have sustained instead of such charges.

3. This act shall be in force from its passage.

COMMONWEALTH OF VIRGINIA:

I, D. Q. Eggleston, Secretary of the Commonwealth of Virginia, and Keeper of the Seals thereof, do hereby certify that the foregoing is a true copy of an act of the General Assembly of Virginia, bearing the title set forth in the caption to the foregoing copy,—approved May 16, 1903,—as the same is published according to law; that said act is still in full force and effect, and has been so continuously since the last-mentioned date.

Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this 25th day of June, in the year of our Lord, nineteen hundred and seven.

[Lesser Seal of the Commonwealth.]

D. Q. EGGLESTON,
Secretary of the Commonwealth and Keeper of the Seals.

201 DEFENDANTS' EXHIBIT NO. 1.

(Sections 155 and 156, Virginia Constitution.)

SEC. 155. A permanent commission, to consist of three members, is hereby created, which shall be known as the State Corporation Commission. The commissioners shall be appointed by the Governor, subject to confirmation by the General Assembly in joint session, and their regular terms of office shall be six years, respectively, except those first appointed under this Constitution, of whom, one shall be appointed to hold office until the first day of February, nineteen hundred and four, one, until the first day of February, nineteen hundred and six, and one, until the first day of February, nineteen hundred and eight. Whenever a vacancy in the commission shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term, subject to confirmation by the General Assembly as aforesaid. Commissioners appointed for regu-

lar terms shall, at the beginning of the terms for which appointed, and those appointed to fill vacancies shall, immediately upon their appointments, enter upon the duties of their office; but no person so appointed, either for a regular term, or to fill a vacancy, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment, or adjourned *sine die* without confirming the same, nor shall he be eligible for re-appointment to fill the vacancy caused by such refusal or failure to confirm. No person while employed by, or holding any office in relation to, any transportation or transmission company, or while in any wise financially interested therein, or while engaged in practicing law, shall hold office as a member of said commission, or perform any of the duties thereof. At least one of the commissioners shall have the qualifications prescribed for judges of the Supreme Court of Appeals; and any commissioner may be impeached or removed in the manner provided for the impeachment or removal of a judge of said court.

The commission shall annually elect one of their members
202 chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed, and subject to removal, by the commission. It shall prescribe its own rules of order and procedure, except so far as the same are specified in this Constitution or any amendment thereof. The General Assembly may establish within the department, and subject to the supervision and control, of the commission, subordinate divisions, or bureaus, of insurance, banking or other special branches of the business of that department. All sessions of the commission shall be public, and a permanent record shall be kept of all its judgments, rules, orders, findings and decisions, and of all reports made to, or by, it. Two of the commissioners shall constitute a quorum for the transaction of business, whether there be a vacancy in the commission or not. The commission shall keep its office open for business on every day except Sundays and legal holidays. Transportation companies shall at all times transport, free of charge, within this State, the members of said commission and its officers, or any of them, when engaged on their official duties. The General Assembly shall provide suitable quarters for the commission and funds for its lawful expenses, including pay for witnesses summoned, and costs of executing processes issued, by the commission of its own motion; and shall fix the salaries of the members, clerks, assistants and subordinates of the commission and provide for the payment thereof; but the salary of each commissioner shall not be less than four thousand dollars per annum. After the first day of January, nineteen hundred and eight, the General Assembly may provide for the election of the members of the commission by the qualified voters of the State; in which event, vacancies thereafter occurring shall be filled as hereinbefore provided, until the expiration of twenty days after the next general election, held not less than sixty days after the vacancy occurs, at which election the vacancy shall be filled for the residue of the unexpired term.

SEC. 156. (*a*) Subject to the provisions of this Constitution and
to such requirements, rules and regulations as may be pre-
203 scribed by law, the State Corporation Commission shall be the department of government through which shall be issued all

charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State. The commission shall prescribe the forms of all reports which may be required of such corporations by this Constitution or by law; it shall collect, receive, and preserve such reports, and annually tabulate and publish them in statistical form; it shall have all the rights and powers of, and perform all the duties devolving upon, the Railroad Commissioner and the Board of Public Works, at the time this Constitution goes into effect, except so far as they are inconsistent with this Constitution, or may be hereafter abolished or changed by law.

(*b*) The commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company. Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable op-

portunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length, for the time and
205 in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws; provided, however, that nothing in this section shall impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons.

(*c*) In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness or reasonableness of the order or re-
206 quirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The commission may be vested with such additional

powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the commission, within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed, or authorized, by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the commission, shall be a separate offence: provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liabilities to fines or penalties.

(*d*) From any action of the commission prescribing rates, charges *of* classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in subsection (*c*) of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges or classifications of traffic, sched-
207 ule, facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action or (if allowed by law) by the Commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts, except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the Commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws, provide for appeals from any other action of the commission, by the Commonwealth or by any person interested, irrespective of the amount involved. All appeals from the commission shall be to the Supreme Court of Appeals only; and in all appeals to which the Commonwealth is a party, it shall be represented by the Attorney-General or his legally appointed representative. No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have juris-

diction to review, reverse, correct or annul any action of the commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, however, that the writs of *mandamus* and prohibition shall lie from the Supreme Court of Appeals to the commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer.

(*e*) Upon the granting of an appeal, a writ of *supersedeas* may be awarded by the appellate court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the appellate court, no action of the commission prescribing or affecting rates, charges or classifications of traffic of any transportation or transmission company shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceedings resulting from such appeal, until a suspending bond shall first have been executed and filed with, and approved by, the commission (or approved on review by the Supreme Court of Appeals), payable to the Commonwealth, and sufficient in amount and security to insure the prompt refunding, by the appealing corporation to the parties entitled thereto, of all charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the court on appeal. The commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any *supersedeas*), of the order or requirement appealed from, to keep such accounts, and to make to the commission, from time to time, such reports, verified by oath, as may, in the judgment of the commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the commission appealed from, together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company pending the appeal be not sustained on such appeal; and the commission shall also, from time to time, require such company, under like penalty, to give additional security on, or to increase, the said suspending bond, whenever, in the opinion of the commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid. Upon the final decision of such appeal, all amounts which the appealing company may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the company to the parties entitled thereto, in such manner, and through such methods of distribution, as may be prescribed by the commission, or by law. All such appeals affecting rates, charges of classifications of traffic, shall have precedence upon the docket of the appellate court, and shall be heard and disposed of promptly by the court, irrespective of its place of session, next after the *habeas corpus*, and Commonwealth's, cases already on the docket of the court.

(*f*) In no case of appeal from the commission shall any new or additional evidence be introduced in the appellate court; but the chairman of the commission, under the seal of the commission, shall certify to the appellate court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission as may be selected, specified and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify. The commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the appellate court, upon disposing of the appeal. The appellate court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the commission appealed from as well as any other matter arising under such appeal: provided, however, that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct; but the court may, when it deems necessary, in the interest of justice, remand to the commission any case pending on appeal, and require the same to be further investigated by the commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the commission by any party in interest), before the appeal is finally decided.

(*g*) Whenever the court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such order as, in its opinion, the commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the commission at the time the original order appealed from was entered. The right of the commission to prescribe and enforce rates, charges, classifications, rules and regulations, affecting any or all actions of the commission theretofore entered by it and appealed from, but based upon circumstances or conditions different from those existing at the time the order appealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the commission, prescribing or altering such rates, charges, classifications, rules or regulations, shall be retroactive.

(*h*) The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit or motion against any transportation or transmission company, for a- claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the commission: but, in no such proceeding by any person against such corporation, nor in any

collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the commission, within the scope of its authority, and then in force, be questioned: provided, however, that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof.

(*i*) The commission shall make annual reports to the Governor of its proceedings, in which reports it shall recommend, from time to time, such new or additional legislation in reference to its powers or duties, or to the creation, supervision, regulation or control
211 of corporations, or to the subject of taxation, as it may deem wise or expedient, or as may be required by law.

(*k*) Upon the organization of the State Corporation Commission, the Board of Public Works and the office of Railroad Commissioner, shall cease to exist; and all books, papers and documents pertaining thereto, shall be transferred to, and become a part of the records of, the office of the State Corporation Commission.

(*l*) After the first day of January, nineteen hundred and five, in addition to the modes of amendment provided for in Article Fifteen of this Constitution, the General Assembly, upon the recommendation of the State Corporation Commission, may, by law, from time to time, amend subsections *a* to *i*, inclusive, of this section, or any of them, or any such amendment thereof: provided, that no amendment made under authority of this sub-section shall contravene the provisions of any part of this Constitution other than the sub-sections last above referred to or any such amendment thereof.

COMMONWEALTH OF VIRGINIA:

I, D. Q. Eggleston, Secretary of the Commonwealth of Virginia and Keeper of the Seals thereof, do hereby certify that the foregoing is a true copy of sections one hundred and fifty-five and one hundred and fifty-six of the Constitution of Virginia, the original of which, by law, is in my custody; that said two sections are still in full force and effect, and have been so continuously since prior to January 1st, 1904.

Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this 25th day of June, in the year of our Lord, nineteen hundred and seven.

[Lesser Seal of the Commonwealth.]

D. Q. EGGLESTON,
Secretary of the Commonwealth and Keeper of the Seals.

212 DEFENDANTS' EXHIBIT NO. 2.

AN ACT

To put into effective operation the provisions of the constitution relating to the creation, appointment and organization of the "State Corporation Commission," its jurisdiction, powers, functions, and duties; the qualifications of the members and officers thereof, their appointment and salaries; the location of its offices, and places and times of its public sessions; its writs, processes, orders, findings and judgments; appeals from its orders, findings and judgments, and its expenses, etc.

Approved April 15, 1903.

Be it enacted by the General Assembly of Virginia as follows:

1. That as used in this act the term "corporation" or "company" shall include all corporations chartered by the acts of the General Assembly of Virginia, or under the general incorporation laws of this State, or doing business therein, and all trusts, associations, and joint-stock companies, having any powers or privileges not possessed by individuals or unlimited partnerships, and shall exclude all municipal corporations and public institutions owned or controlled by the State; the term "charter" shall be construed to mean a charter of incorporation by or under which any such corporation is formed; the term "transportation company" shall include any company, trustee, or other person owning, leasing, or operating for hire, a railroad, street railway, canal, steamboat, or steamship lines, also any freight-car company, car association or car trust, express company, or company, trustee, or person in any way engaged in business as a common carrier over a route acquired, in whole or in part, under the right of eminent domain; the term "transmission company" shall include any company owning, leasing, or operating for hire, any telegraph or telephone line; the term "public service cor-
213 poration" shall include all transportation and transmission companies, all gas, electric light, heat, and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public; the term "person" as used in this act shall include individuals, partnerships, and corporations, in the singular as well as in the plural number; the term "the commission" shall be construed to mean the "State Corporation Commission," and the word "officers," when used in connection with said commission, shall be construed to mean any clerk, bailiff, assistant, or other appointee of the State Corporation Commission.

Appointment of Members of Corporation Commission; Terms; Commission.

2. That the governor shall, at least fifteen days before the first day of February, nineteen hundred and four, and at least fifteen

days before the first day of February in each alternate year thereafter, appoint, subject to the confirmation of the General Assembly, in joint session, a citizen of this State, possessing the qualifications prescribed by the Constitution and by law to be a member of the "State Corporation Commission" (which shall be composed of three members), and whose term of office shall be that prescribed by the Constitution, and shall begin on the first day of February next succeeding his appointment and confirmation, except in the case of an appointee to fill a vacancy, or where the General Assembly fails to confirm an appointee to a full term of office before the date fixed by law for the commencement of his said term of office; in either case the term of office of any such appointee shall begin from the date of his qualification, and shall be for the unexpired portion of the term of office to which he shall be so appointed and confirmed. The members of the commission first appointed and confirmed, and those hereafter appointed and confirmed, shall hold office for the
214 respective terms for which they have been, or may hereafter be, appointed, and until their respective successors in office have been appointed, confirmed, and qualified, unless they shall sooner be removed from office as prescribed by the Constitution or by law. The governor shall commission each of the members of the commission, and said commission shall be filed by the members in the office of the clerk of the commission.

Who Eligible to Serve as a Member of the Commission; Qualifications, etc.

3. That no person shall be eligible to serve as a member of the State Corporation Commission who, on the date of the commencement of his term of office, shall be employed by or hold any office in relation to any transportation or transmission company, or is in any way financially interested therein, or is engaged in the practice of law; nor shall any person be eligible to appointment as a member of the commission unless at the time of his appointment he is a qualified voter under the Constitution and laws of this State. One of the commissioners shall have the qualifications prescribed for judges of the supreme court of appeals.

Oath of Office.

4. That the members of the commission and the officers thereof, for whose appointment provision is made either by the Constitution or by law, before entering upon the discharge of the duties of their respective offices, shall, in addition to the oath prescribed by section thirty-four of the Constitution, severally take and subscribe the following oath, to-wit:

"I, —— ——, do solemnly swear (or affirm) that at the present time I am not employed by, and do not hold any office in relation to, any transportation or transmission company, and have not in any wise any financial interest in any such company, and am not engaged in the practice of law, and that during the term of my office

as — I will not either, directly or indirectly, be employed by
215 or hold any office in relation to any transportation or transmission company, or in any wise be financially interested in any such company, or be engaged in the practice of law, so help me God."

But the said additional oath shall be taken and subscribed by the first members of the commission and by the officers thereof as soon as practicable after the passage of this act.

The oaths prescribed by the Constitution and this act may be taken and subscribed before any officer authorized by the laws of this State to administer oaths, and shall be certified by such officer and recorded on the minutes of the proceedings of the commission, and then returned by its clerk as required by law as to the oaths of other State officers.

Offices of Commission to be Located in the City of Richmond; Where Notice, Writ or Process to be Returnable; When Public Sessions May be Held Elsewhere.

5. That the offices of the commission shall be located, and its public sessions, held, in the city of Richmond, and all notices, writs, and processes issued by the commission shall be made returnable to, and command the corporation or person against whom directed to appear before the commission and answer on a certain day to be named therein: provided, however, the commission may in its discretion, if public necessity or the convenience of the parties require, hold public sessions elsewhere in the State, and may order any notice, writ, or process to be made returnable to the place of any such session; and for the holding of any such session the commission may occupy the court-room of the court-house of the city or county wherein such session may be held if said court-room shall not at the time be in use for the sessions of the court of any such city or county.

Offices.

6. That the rooms in the State library building now occupied as offices by the railroad commissioner shall be the offices of the
216 commission, its clerk, bailiff, assistants, and subordinates until otherwise provided by law, and the register of the land office is hereby directed to have the said rooms fitted up in a suitable manner for the use and occupation of the commission and its officers. And the sum of five hundred dollars, or so much thereof as may be necessary, is hereby appropriated for that purpose out of any moneys in the treasury not otherwise appropriated.

Clerk, Assistant Clerk, Bailiff, Stenographer, &c., Qualifications and Terms.

7. That the commission shall have a clerk, a first assistant clerk, a bailiff, and a stenographer (who shall also be a typewriter), each of whom shall have the qualifications for office, be clothed with the power, discharge the functions and perform all the duties herein-

after prescribed, and such other duties as may be prescribed or required by the commission, and all of whom shall be appointed by the commission, and whose respective terms of office shall be as prescribed by the commission, and they shall be subject to removal by the commission as hereinafter in this act provided. The officers so appointed shall hold office until their successors have been appointed, qualified, and given bond as required by law, unless they shall sooner be removed from office, as hereinafter provided.

Officers to be Residents of the State and Qualified Voters.

8. That the officers of the commission shall at the time of their appointment be actual residents of this State, and qualified voters therein, under the Constitution and laws thereof.

The First Members of the Commission to Meet, Organize, Appoint Clerical Force, &c.; When the Commission to be Vested With Powers and Function of Office.

9. That the persons appointed, confirmed, and commissioned to be the first members of the commission under the provisions of
217 section one hundred and fifty-five of the Constitution shall, as soon as practicable, meet in the office now used by the railroad commissioner and organize by taking and subscribing the oaths of office prescribed by the Constitution and by this act, and elect one of their number as chairman of the commission, appoint a clerk, a first assistant clerk, a bailiff, and a stenographer; and when organized the commission shall have all the powers, discharge all the functions, and perform all the duties prescribed by the Constitution and by law.

When the Office to Become Vacant; How Vacancies Filled.

10. That if any person heretofore or hereafter appointed and confirmed to be a member of the commission, or if any person appointed an officer of the commission, shall fail to qualify as required by the Constitution or by law, or to give any bond required by law of any such officer within thirty days after the date fixed by the Constitution or by law, as the commencement of the term of office to which he shall be appointed, then such office shall because of such failure to qualify, or to give any required bond within the time aforesaid, become vacant, and such vacancy shall, in the case of members of the commission, be filled as prescribed by section one hundred and fifty-five of the Constitution, and in the case of officers and appointees of the commission, be filled by appointment of the commission.

Duties of Clerk; Records; Certified Copies Same Legal Effect.

11. That the clerk of the commission shall keep a minute book in which shall be recorded all the proceedings, orders, findings, and judgments of the public sessions of the commission, and the minutes of the proceedings of each day's public session shall be read and approved by the commission and signed by its chairman, or acting

chairman; he shall, subject to the supervision and control of the commission, have custody of and preserve all of the records, documents, papers, and files of the commission, or which may be filed before it in any complaint, proceeding, contest or controversy,
218 and said records, documents, papers, and files shall be open to public examination in the office of said clerk to the same extent as the records and files of the courts of this Commonwealth; he shall, when requested, make and certify copies from any record, document, paper, or file in his office, and if required, affix the seal of the commission thereto, and except when made at the instance of the commission or on behalf of the Commonwealth, he shall charge and collect the same fees as are fixed by law for like services rendered by the clerks of the courts of this Commonwealth, and any such copy, so certified, shall have the same faith, credit, and legal effect as copies made and certified by the clerks of the courts of this Commonwealth from the records and files thereof; he shall certify all allowances made by the commission to be paid out of the public treasury for witness fees, service of process, or other expenses; issue all notices, writs, processes or orders awarded by the commission; or authorized by law, or by the rules of the commission; he shall receive all fines and penalties imposed by the commission, all moneys collected on judgments, all registration fees required by law to be paid by corporations, all fees collected by any officer of the commission, and the tax on the seal of the commission, and shall keep an accurate account of the same and what disposition has been made thereof, together with all fees collected by him for services rendered, either by him or his assistants, and shall, at least once in every thirty days during his term of office, render a statement of all such receipts and collections to the auditor of public accounts, and pay the same into the treasury of the Commonwealth, and shall keep all such other accounts of such collections and disbursements, and shall make all such other reports thereof as may be required by law or by the regulations prescribed by the auditor of public accounts; and generally shall have the powers, discharge the functions, and perform the duties of a clerk of a court of record in all matters within the jurisdiction of the commission.

219 Duties and Powers of First Assistant Clerk.

12. That the first assistant clerk of the commission shall have the powers, discharge the functions, and perform the duties in all matters within the jurisdiction of the commission of a deputy clerk of a court of record, and shall perform as well the duties of the clerk of the commission during the absence of said clerk, and in case of the death, resignation, incapacity, or removal from office of the clerk, he shall be the acting clerk of the commission until the vacancy in the office of clerk shall be filled.

Duties and Powers of the Bailiff.

13. That the bailiff of the commission shall, in all matters within the jurisdiction of the commission, have the powers, discharge the functions, and perform the duties of a sheriff or sergeant under the

law; he shall preserve order during the public sessions of the commission, and may make arrests and serve and make return on any writ or process awarded by the commission, and execute any writ, order, or process of execution awarded upon the findings or judgments of the commission in any matter within its jurisdiction.

Duties of the Stenographer, &c.

14. The stenographer and other assistants and subordinates of the commission shall perform the duties required of them by law or by the commission, under its rules, regulations, and requirements.

The Commission to Require Its Officers to Enter into Bond; Amount, Conditions, and Recordation of Same.

15. The commission shall require its clerk, first assistant clerk, and bailiff, before entering upon the discharge of the duties of their respective offices, each to enter into bond, with surety to be approved by the commission, in such penalty as the commission
220 may deem sufficient (not in any case less than five thousand dollars), conditioned for the faithful performance of the duties of their respective offices, and for the prompt and full accounting for and payment into the treasury of all moneys received by them, respectively, as officers of the commission. The said bonds shall be made payable to the Commonwealth, and may be proceeded on and enforced in any circuit or corporation court in like manner as the official bonds of other officers of this Commonwealth, or of its courts. Said bonds shall be recorded in the record of the proceedings of the commission, and the original bonds transmitted by its clerk to the auditor of public accounts, who shall file and preserve the same in his office.

Powers of the Commission.

16. The commission shall have power and authority to require, by its rules, regulations, and requirements, all corporations chartered under the laws of this State, and all foreign corporations, doing business in this State, to perform and discharge any public duty or requirement imposed upon such corporations by the Constitution, or by law, and may require all such corporations to furnish such reports to the commission as may be provided by the Constitution, or by law, and the commission may enforce against any such corporation, by its judgments and processes, any fine or other penalty imposed by law for the failure of any such corporation to perform any public duty required of it, or to comply with any requirement of law, or any lawful regulation of the commission in reference to the same. The commission may require the establishment by transportation companies of separate waiting rooms at all stations, wharves, or landings for the white and colored races.

221 Duties of the Commission with Respect to Transportation Companies, &c.

17. It shall be the duty of the commission to make inquiry and examination from time to time into the acts and proceedings of railroad, canal, steamboat, steamship, or other transportation companies, and other chartered common carriers and transmission companies, doing business in this State, their officers and agents, for the purpose of ascertaining whether anything has been done or omitted in violation or contravention of their charters, or of the law.

The Commission to Examine all Railroads, &c.

18. The commission shall examine all the railroads and the works and equipment thereof, and the works and equipment of all other transportation companies, and keep itself informed as to their physical condition and the manner in which they are operating with reference to the security and accommodation of the public, and the compliance of the several companies with the provisions of their charters and the laws of the Commonwealth. And the provisions of this section shall apply to all railroads and other transportation companies, and to the corporations, trustees, receivers, or other person owning or operating the same.

The Commission to give Notice to Transportation or Transmission Company of Violation of Law, and Compel Compliance with Same.

19. Whenever, in the judgment of the commission, it shall appear that any transportation or transmission company has violated any law of this State, or has neglected in any respect or particular to comply with the terms of its charter, or with the provision of any of the laws of the Commonwealth, it shall give notice thereof in writing to such company or the person operating the same; and if the violation or neglect be continued after such notice, the commis-
222 sion shall take such proceedings and impose such fines or penalties within its jurisdiction as shall be necessary to compel such transportation or transmission company to comply with the terms of its charter and the provisions of the laws of the Commonwealth.

The Commission to Compel Railroad to Make Repairs When Necessary; Notice; Railroad May be Heard Thereon; Penalty.

20. Whenever in the judgment of the commission it shall appear that repairs are necessary upon any railroad, or that any addition to its rolling stock, or addition or improvement in the equipment of any other transportation line, or any enlargement of or improvement in the stations or station houses, waiting rooms, wharves or landings, or any change in the mode of operating the road, or other transportation line, and conducting its business, is reasonable and expedient in order to promote the security and accommodation of the public, it shall give ten days' notice in writing to the company or person

operating the road, or other transportation line, of the improvements and changes which it adjudges to be proper, designating when and where the contemplated action in the premises will be considered and disposed of, and such company or person shall be afforded a reasonable opportunity to introduce witnesses and to be heard thereon, and any such company or person failing or refusing to obey any valid order or requirement of the commission in the premises within such reasonable time, not less than ten days, as shall be fixed in the order of the commission, it may impose upon any such company or person the fines and penalties prescribed by the Constitution and by law for its or his failure to obey the orders and requirements of the commission and the requirements of the law, and enforce the payment and collection thereof by its judgments and processes.

When Commission to Make an Examination of Road; Notice; Fines; How Same May be Enforced.

223 21. Upon the complaint and application of the mayor or counsel of any city or town, or the board of supervisors of any county within which any part of any transportation or transmission line is located, it shall be the duty of the commission to make an examination of the physical condition and operation thereof. Before proceeding to make such examination in accordance with such application, the commission shall give to the applicants and the corporation or person operating any such line reasonable notice in writing, of the time and place of entering upon the same. If upon such examination it shall appear to the commission that the complaint alleged by the applicant is well founded, it shall so adjudge and shall notify such corporation or person of its adjudication; and if such corporation or person fail for sixty days after such notification to remove the cause of complaint, the commission shall impose the fines and penalties provided by the Constitution and by law for its failure to obey the orders and requirements of the commission, and enforce the collection thereof by its judgments and processes.

Commonwealth to be Complainant, &c.

22. That in all complaints, proceedings, contests, or controversies by or before the commission, whether instituted by the Commonwealth or by the commission of its own motion, the Commonwealth shall be complainant, and the party against whom the complaint is preferred, or the proceeding instituted, shall be the defendant. Any party complainant or defendant in any complaint, proceeding, contest or controversy shall be entitled to process, to convene parties, compel the attendance of witnesses, or the production of books and papers, in any proceeding or hearing before the commission.

Proceedings to be as in Courts of Record.

23. That the commission, on hearing of all complaints, proceedings, contests, or controversies, in which it shall be called upon to

decide or render judgment in its capacity as a court of record,
224 shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of this Commonwealth, in like manner as complainants and defendants in the courts of this Commonwealth.

Perjury.

24. That any person who shall wilfully swear falsely touching any material fact or matter in any complaint, proceeding, investigation, contest or controversy instituted or pending before the commission shall be deemed guilty of perjury.

The Commission to Cause its Rules of Procedure, &c., to be Entered of Record and Printed; Distribution of Copies.

25. That the commission shall cause its rules of order and procedure to be entered upon the records of its proceedings and to be printed, as well as all amendments and additions to the same, and shall furnish copies thereof to county and city clerks and to any citizen of this State upon application therefor.

The Commission to Summon Party Before Imposing Fine or Penalty; Contempts; Notice to be Given as to Rules or Orders Directed Against One or More Companies; General Order, Rule, &c., to be Published; Suspension of Order During Appeal; Penalties.

26. That the commission, before entering any judgment for any fine or penalty imposed by law shall summon or rule the party upon whom such fine or penalty is sought to be imposed to appear before the commission at some public session to be designated in the process, to show cause against such fine or penalty, and why the same should not be imposed and judgment rendered therefor: provided, that the provisions of this section shall not apply to contempts com-
225 mitted in the presence of the commission while in public session; and before the commission shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such order, rule, regulation, or requirement shall first be given by the commission at least ten days' notice of the time and place when and where the contemplated action of the commission in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done; and before the commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published in substance, not less than once a week for four consecutive weeks, in one or more newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such

general order, rule, regulation, or requirement made by the commission shall be published at length for the time and in the manner above specified before it shall go into effect, and shall also, as long as it remains in effect, be published in each subsequent report of the commission. Any corporation failing or refusing to obey any valid order or requirement of the commission within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission such sum, not exceeding five hundred dollars, as the commission may deem proper, or in such sum in excess of five hundred dollars as may be prescribed or authorized by law; and each day's continuance of such failure or refusal after due service upon such corporation of the order or requirement of the commission shall be a separate offense: provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed
226 against the company in the matter of its liability to fines or penalties: provided, further, that the power of the commission to impose the penalties prescribed by the Constitution, or by the law, for the failure or refusal of any corporation to obey its valid orders and requirements, shall not be construed to relieve any company or corporation from the penalties now prescribed or hereafter to be prescribed by law for the failure or refusal of any such company or corporation to perform any public duty or requirement prescribed, or which may be prescribed by any law of this State, but that such penalties may be enforced by the commission in addition to the penalties authorized to be imposed by the Constitution and by law for failure or refusal to obey any of its valid orders or requirements.

Powers of the Commission with Respect to Rendering and Enforcing Judgments, Penalties, &c., Collection and Payment of Same into the Treasury.

27. The commission shall have power and authority in all matters of which it has jurisdiction under the Constitution, or the laws of this Commonwealth, to render and enter up judgment for fines and penalties, or for the recovery of money, in any complaint, proceeding, contest, or controversy, whether instituted of its own motion or otherwise, and to issue process of execution thereon, which may be levied and executed in like manner as executions awarded and issued upon the judgments or decrees of the courts of law or equity of this Commonwealth. All judgments of the commission for fines or penalties, for contempt, or for the violation of any provision of the Constitution, or the laws of this State, or for the failure or refusal of any corporation to obey and observe the lawful rules, regulations, or orders of the commission, shall be entered up in favor of the Commonwealth, and when collected shall be paid by the clerk of the commission into the treasury, as hereinbefore provided.

227 The Commission to Have Power to Punish for Contempt by Fine or Imprisonment, &c., to the Same Extent and Manner as Courts; Commitment to Jail, &c.; Writ of Error.

28. The commission shall have powers and jurisdiction possessed and exercised under the law by the courts of record of this Common-

wealth to punish for contempt by fine or imprisonment, or by both, any person duly summoned to appear and testify before the commission who shall fail or refuse to appear and testify, without a lawful excuse, or who shall refuse to answer any proper question propounded to him by the commission in the discharge of its duty or who shall conduct himself in a rude, disrespectful, or disorderly manner before the commission, or any of them, deliberating in the discharge of duty in public session, and may, for any such contempt, impose the same penalties, either by fine or imprisonment, or by both, and render and enter up judgment in any such proceeding and enforce the same by process of execution or by commitment to jail, or by both, in the same manner and by like process and proceedings, and to the same extent, as may by law be done by any of the courts of this Commonwealth. The commission may commit any person adjudged by it guilty of contempt to the jail of any city or county in the Commonwealth, and the jailer thereof shall receive such person upon the commitment of the commission, attested by its clerk, first assistant clerk, or acting clerk, and confine such person in the jail of his city or county, as the case may be, for the term of imprisonment specified in the commitment, unless sooner discharged therefrom by due process of law. The said jailer shall receive for the board of any person so committed the same allowance made by law for other persons confined in such jail, which shall be paid out of the public treasury upon the allowance of the commission, certified as hereinbefore provided. The fines and judgments of the commission in any contempt proceeding may be reviewed, affirmed, reversed, or modified, as justice may require, on writ of error from the commission to the supreme court of appeals.

228 The Commission May Award and Issue, Serve, Execute, and Return Process, &c., and Compel Attendance of Witnesses, as Courts.

29. That the commission shall, in all matters within its jurisdiction, have the power and authority to award and issue, have served, executed, and returned, any writ, notice, process, order, or order of publication which may by law be awarded, issued, served, executed, or returned by or to any court of law or equity in this Commonwealth, for the purpose of compelling the attendance of witnesses, the production of books and papers, the convening of parties, or the enforcement and execution of its findings, orders, or judgments.

Writs, &c., to Run in the Name of the Commonwealth; by Whom Issued and Served; Fees; Duties of Bailiff; Penalty for Failure to Execute Writ, &c.

30. That all writs, processes, and orders of the commission shall run in the name of the Commonwealth, and shall be attested by its clerk, or first assistant clerk, or acting clerk, and shall be directed to its bailiff, and may be served, executed, and returned by the said bailiff, in any city or county of the State, or by the sergeant or sheriff, or any constable, of any city or county in this State within his bailiwick. All writs, notices, processes, or orders of the commission may be served, executed, and returned in like manner and upon like

persons or property as the processes, writs, notices, or orders of the courts of record of this Commonwealth, and when so served, executed, and returned shall have the same legal effect. The bailiff or other officer serving or executing any writ, notice, process, or order of the commission shall receive the same fees and commissions allowed by law for like services to the sergeants and sheriffs of the cities and counties of this State: provided, that the bailiff of the commission shall account for and pay to its clerk all fees and commissions received by him for any services which he may render, which
229 shall be accounted for and paid by the clerk of the commission into the treasury, as hereinbefore provided. The bailiff, or any other officer hereinbefore named, who shall fail to execute and return any writ, notice, process, or order of the commission shall be subject to the penalties prescribed by law for the failure to execute and return the process of any court, which penalties may be enforced by the judgment of the commission.

The Commission to Tax and Collect Like Fees and Costs as Courts; Fees and Mileage of Witnesses.

31. That the commission shall cause to be taxed and collected in all complaints, proceedings, contests, or controversies instituted or pending before it, like fees and costs taxed and collected for like services by the officers of the courts of this Commonwealth; also, the fees and mileage of witnesses attending upon its public sessions, and may enter judgment for the same and issue execution thereon, which execution may be levied and executed in like manner as execution issued upon the judgments or decrees of the courts of law or equity of this Commonwealth: provided, that no costs shall be taxed or collected against the Commonwealth except on appeals of corporations under the provisions of section one hundred and eighty of the Constitution, which have been aggrieved by the assessments and ascertainments made by the commission under sections one hundred and seventy-six and one hundred and seventy-eight of the Constitution.

Judgments of the Commission to be a Lien on Real Estate When Duly Docketed, &c.; How Enforced; Clerks to Docket Judgments Certified by the Clerk of the Commission.

32. That the judgments of the commission for the recovery of money, fines, or penalties shall be a lien on the real estate of the judgment debtor when duly docketed and indexed in the judgment lien docket as the judgments of the courts of record are required by law to be docketed and indexed, in the county or city in which
230 the real estate of the judgment debtor is located, and the lien of such judgment may be enforced in equity before any court having jurisdiction to enforce liens. The clerks of the courts of the several cities and counties shall docket all such judgments on the lien docket of their respective courts when a copy thereof, certified by the clerk of the commission, shall be presented for that purpose.

When Sessions of the Commission Public; Judgments to be Rendered in Public Session; When Judgment Effective; Number, Time and Commencement of Session; One Regular Session Every Three Months.

33. That the sessions of the commission for the hearing of any complaint, proceeding, contest, or controversy instituted or pending before it, whether of its own motion or otherwise, shall be public, and its findings, decisions, and judgments shall be announced and rendered in public session. The judgments of the commission for fines or penalties, or for the recovery of money, shall take effect as of the date of such judgment, and when allowed by the commission in its order and entered up, the judgment shall bear interest from that date. The commission may, by its rules, provide for the number of its regular public sessions in each year, the time of their commencement, their duration, and for their adjournment; and may also provide for extra or special public sessions when, in their judgment, such extra or special public sessions may be necessary or required. The commission shall hold at least one regular public session in every three months in each year.

Appeal to Supreme Court; How Taken and Perfected; to be Heard Promptly, &c.; How Section Construed.

34. That the Commonwealth or any party aggrieved by any final finding, order, or judgment of the commission shall have, of right, regardless of the amount involved, an appeal to the supreme court of appeals, same to be taken and perfected within six months from the date of such final finding, order, or judgment, and the
231 supreme court of appeals may, on petition of the attorney-general, or any other party so aggrieved, if said petition be presented within six months from the date of the final finding, order, or judgment of the commission, award a writ of supersedeas to any such final finding, order, or judgment, and may review, affirm, reverse, or modify the same, as justice may require, and enter therein such order as may be right and just. All such appeals shall be taken and perfected, heard and determined, and the mandate of the supreme court of appeals certified down to the commission in the same manner as appeals in equity causes from the circuit or corporation courts of this Commonwealth to the supreme court; except such appeals shall be heard and disposed of promptly by the supreme court, irrespective of its place of session, next after *habeas corpus* and Commonwealth's cases already on the docket; provided, however, this section shall not be construed to interfere in any way with the provisions of subsections (*d*), (*e*), (*f*), and (*g*) of section one hundred and fifty-six of the Constitution, as to appeals from the action of the commission, prescribing rates, charges, or classification of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusal to approve a suspending bond, or requiring additional security thereon, or an increase thereof; but shall be construed to provide only for appeals from the final findings, orders, and judgments of the commission in cases not expressly provided for by the Constitution.

Suspending Bond on Appeal; Costs, &c.

35. That the commission may require a suspending bond on any appeal, in such penalty and with such surety thereon as it may deem sufficient, and may during the pendency of any appeal, at any time, require the increase of any such bond or additional security thereon: provided, however, there shall be of right, regardless of the amount, an appeal from the action of the commission refusing to approve a suspending bond, or requiring an increase thereof, or additional security thereon, in like manner as provided by subsections (*d*), (*e*), (*f*), and (*g*) of section one hundred and fifty-six of the Constitution. The commission may also require bond for the payment of costs in such penalty, and with such security, as it may deem sufficient, in any complaint, proceeding, contest, or controversy instituted or pending before it. All suspending bonds, and bonds for the payment of costs, taken or required to be taken by the commission, shall be made payable to the Commonwealth, and may be enforced in the name of the Commonwealth by motion or other legal proceeding or remedy before the commission, or in any circuit or corporation court of this Commonwealth having jurisdiction of a motion or action on such bonds, and the process and proceedings thereon shall be as provided by law upon bonds of the like character required and taken by any court of this Commonwealth, and the commission or such circuit or corporation court may render and enter up like judgments upon such bonds as may, by law be rendered and entered upon bonds of like character, and process of execution shall issue upon such judgments, and may be levied and executed as provided by law in other cases.

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Transportation Company upon Final Decision of Appeal to Refund Amount Collected Pending the Appeal in Excess of that Authorized; Penalty; Amount of Judgment Distributed Among Those Entitled Thereto.

36. That if any transportation company, upon the final decision of an appeal from the action of the commission prescribing rates, charges, or classification of traffic, confirming or modifying the action of the commission, shall fail to refund in the manner and within the time prescribed in the notice of the commission all amounts which the appealing company may have collected pending the appeal, in excess of that authorized by such final decision, upon notice to such corporation by the commission of such final decision, then the commission, after thirty days' notice to any such company, may, unless the amount required by such order be paid to the clerk of the commission, render and enter judgment in the name of the Commonwealth, for the use of the persons, firms, and corporations entitled to the same, against any such company for the aggregate amount of such collections and for costs, and may enforce the amount of such judgment and costs by process of execution as hereinbefore provided as to the enforcement of the judgments of the commission. The commission shall, upon the collection of said judgment, forthwith distribute the amount thereof, through its clerk, among the parties entitled thereto, respectively,

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in such manner as it may by its rules or orders prescribe, and shall, upon the payment or collection of any such judgment, enter the same satisfied upon its records, and have the same entered satisfied on the judgment lien docket of the court of any city or county where the same may have been docketed, and the satisfaction of any such judgment shall be a bar to any further action or recovery against any such corporation to the extent of such recovery.

Accidents.

37. The commission may investigate the cause of any accident on any transportation line which, in its judgment, shall require investigation.

Transportation of Convicts and Insane Persons.

38. The commission is authorized to enter into contracts with the several railroads and other transportation companies, doing business in this State, for the transportation of convicts, insane, or other persons, who are cared for by the State, and of sheriffs and all necessary guards, to and from the penitentiary and the several State hospitals in this State, upon such terms as the commission and the several companies may agree, not to exceed two cents per mile for each person transported under such contract. Said contracts
234 may be renewed or extended for such time as the commission shall deem to be to the interest of the State.

The Commission to Determine the Most Direct Route, Furnish Schedules, &c., to Hospitals and Penitentiary.

39. The commission shall determine the most direct and practicable route from each courthouse by which to convey persons to the penitentiary and the several State hospitals, and shall file with the auditor of public accounts, the superintendent of the penitentiary, the superintendents of the several State hospitals, and the clerks of the several counties and corporations, a schedule of the route determined upon.

The Commission to Furnish Schedule Certificates of Transportation; by Whom Signed; How Companies May Collect on Same.

40. The commission shall furnish with such schedule certificates of transportation in the form agreed upon in its contract with the companies. Said certificates shall be signed by the clerk of the commission, and shall be taken up by the conductor or other agent authorized by said companies to collect fare, as other tickets or fares are collected. They shall be presented by the companies holding the same, either monthly or quarterly, as may be determined upon by the commission and the companies, to the auditor of public accounts, who shall examine the same, and if found correct, pay them as other claims against the State are audited and settled.

The Commission to Furnish Compilation of Statute Laws, &c., Governing Common Carriers, Distribution of Same; Rules to be Posted.

41. The commission shall, annually, on the first day of January, publish a compilation of the statute laws governing common carriers in the State of Virginia, together with a compilation of the rules and regulations prescribed for their government by the commis-
235 sion, and shall furnish a sufficient number of copies to each railroad company or transportation company, or person operating the same, to enable such company or person operating the same to post and keep posted conspicuously in every passenger and freight depot of the company, a copy of such laws, rules and regulations; and every such company, or person operating the same, is hereby required to see that such copies, when furnished by the commission, are posted and kept posted in the manner prescribed.

Seal of the Commission; to What It May be Affixed; Its Force and Effect; Fee.

42. That the commission shall have and use a common seal, to consist of a circular die with the coat-of-arms of Virginia and the title "State Corporation Commission" stamped upon the face of the die, and shall have power to affix said seal to any paper, record, or document when necessary for the purpose of authentication, and such seal, when so affixed to any paper, record, or document emanating from the commission or its clerk's office, shall have the same force and effect for authentication as the seal of any court of record in this State. The clerk of the commission shall collect a tax of one dollar for each impression of said seal upon any paper, record, or document, for which tax he shall account to the auditor of public accounts, and pay the same into the public treasury as hereinbefore provided.

Docket.

43. That the commission shall keep a docket of all complaints, proceedings, contests, and controversies instituted or pending before it, and all cases shall be numbered on the docket in the order in which they were instituted, and the papers therein jacketed and numbered in the same consecutive order, and when finally determined and disposed of, the papers and files shall be filed and preserved in the same numerical order and properly indexed for convenient future reference.

236 Allowance for Expenses, &c., to be Paid Out of the Public Treasury; Compensation, Mileage, &c., of Witness.

44. The commission shall, by order entered upon the records of its proceedings, make all allowances to be paid out of the public treasury for expenses, witness fees, and mileage, and for service of process, and when so allowed and certified by its clerk to the auditor of public accounts, the last-named officer shall draw his warrant for the payment of the amount of any such allowances out of the public treas-

ury: provided, that the commission shall not allow to any witness exceeding one dollar per day for his attendance, nor exceeding five cents per mile for each mile traveled to and from the place of attendance, and shall not make any allowances to be paid out of the public treasury save when the expenses incurred, the witness' attendance, or the services of process, is at the instance of the commission, or on behalf of the Commonwealth.

Register of Corporation; List of Charters to be Furnished by Secretary of the Commonwealth.

45. That the commission shall have made and kept in its clerk's office a register of all corporations, which register shall contain the corporate names of all corporations heretofore chartered and existing at this date, so far as the same may be obtainable, and those hereafter chartered by the laws of this State, and of all foreign corporations heretofore or hereafter licensed to transact business in this State, and as to domestic corporations shall contain also the following information, to-wit: Date of incorporation. Names and residences of officers and directors. Amount of capital stock, and whether preferred or common, or both, and the amount of each. Amount of bonds to be issued. Nature of corporate enterprise or business to be conducted. The place of its principal or general office or place of business.

The secretary of the Commonwealth shall forthwith prepare
237 and furnish to the commission a list of all charters recorded in his office up to April first, nineteen hundred and three, containing the above information so far as shown by the records of his office.

The Commission to Issue All Charters, &c., and to Certify Same under Its Seal to the Secretary of the Commonwealth; Recordation; Granting License to Foreign Corporations; Fees.

46. The commission shall issue all charters and all amendments, extensions, and renewal of charters, upon application, complying with the provisions of the incorporation laws of this State, and when any charter, or amendment, extension, or renewal of charter is issued, shall certify the same, under its seal, to the secretary of the Commonwealth for recordation as required by law, and the commission shall have the granting of all licenses to foreign corporations to transact business in this State. The commission shall, before approving any application or petition for a charter, or granting any license to any foreign corporation to transact business in this State, require the payment of the fees prescribed by law, and on or before the first day of March in each year, in addition to the franchise tax and the fees otherwise prescribed by law, require each domestic corporation, other than a purely charitable institution, and each foreign corporation doing business in this State, to pay a registration fee as follows: Where the proposed maximum capital stock is fixed at fifteen thousand dollars or under, or if such corporation is organized on a mutual basis or without capital stock, five dollars; in excess of fifteen thousand dollars and not over fifty thousand dollars,

ten dollars; in excess of fifty thousand dollars and not over one hundred thousand dollars, fifteen dollars; in excess of one hundred thousand dollars and not over three hundred thousand dollars, twenty dollars; and in excess of three hundred thousand dollars, twenty-five dollars; all of which fees shall be collected and received by its clerk and accounted for and paid into the public treasury as hereinbefore provided.

238 The Commission to Designate Depository; Deposits; Checks; Officer Collecting Judgment to Pay Same within Ten Days; Penalty.

47. That the commission shall designate some State depository as a place of deposit for the moneys received by its clerk under this or any future act of the general assembly, and shall require its clerk to deposit therein all moneys received by him at least once in every twenty-four hours, and all checks upon said depository drawn by said clerk shall be countersigned by the chairman or acting chairman of the commission. That the bailiff of the commission, or any sergeant, sheriff, or constable who shall collect any judgment, or any part thereof, rendered by the commission, shall, within ten days after such collection, pay the amount thereof, either in current funds or by certified check, to the clerk of the commission. Any officer of the commission, or any sergeant, sheriff, or constable who shall omit or fail to perform any of the requirements of this section, shall be fined not less than five hundred dollars nor more than one thousand dollars, which may be imposed and judgment rendered therefor and enforced by the commission. All proceedings against any such officer and the surety on his official bond, may be had as provided by law in reference to official bonds, for default in the accounting for, or payment over, of any moneys collected or received by him under the provisions of this act.

The Commission to Notify Corporation of the Amount of Registration Fee.

48. That the commission shall annually, on or before the first day of December, notify each corporation subject to a registration fee of the amount thereof, and when the same is payable, and when paid its clerk shall promptly receipt therefor to the corporation paying the same, such notice to be mailed to the last address furnished by such company.

239 Free Transportation to Members of the Commission.

49. That all transportation companies operating in this State shall, on the order of the commission, attested by its clerk, or on an order signed by any member of the commission, furnish free transportation to the members of the commission and its officers, when traveling on official business, and the order for such transportation shall show that the same is desired for official business.

Supplies, Printing, Expenses, &c.

50. That the commission shall have authority to purchase all necessary supplies, and to have all necessary printing and publishing done, and to secure all telephone and telegraph service necessary to the efficient discharge of its duties, and the same shall be paid out of the fund appropriated for its incidental and contingent expenses: provided, however, that all printing necessary for the commission shall be done by the public printer on its order.

Report of the Commission.

51. That the commission shall, on or before the first day of December in each year, tabulate and publish in statistical form such reports made to it in pursuance of the Constitution and laws of this State, as required by subsection (*a*) of section one hundred and fifty-six of the Constitution proper, and shall on the same date in each year, make report to the governor as required by subsection (1) of said section, to be by him laid before the general assembly at each regular session thereof.

Impeachment.

52. That any member of the commission who, during the term of his office, shall be directly or indirectly employed by, or hold any office in relation to, any transportation or transmission company, or in any wise become interested therein, financially, or shall engage in the practice of law, or be guilty of misfeasance or malfeasance in office, shall be impeached and removed from office in the same manner provided for the impeachment and removal of judges of the supreme court of appeals; and any officer of the commission for like causes, or for neglect of duty, or when, in the judgment of the commission, the public service will be promoted thereby, may be removed from office by the commission.

Board of Public Works and Railroad Commissioner to Surrender Records, Books, &c., to the Commission.

53. The board of public works and the railroad commissioner shall on the second day of March, nineteen hundred and three, or as soon thereafter as requested by the commission, surrender and deliver to the commission the records, books, files, and papers of their respective offices, and thereafter said records, books, files, and papers shall be and remain a part of the records, books, papers and files of the commission.

Salaries.

54. That the annual salaries of the members and officers of the commission shall be as follows: Each commissioner, four thousand dollars; the clerk, two thousand dollars; the first assistant clerk, fifteen hundred dollars; the stenographer, twelve hundred dollars; and the bailiff, nine hundred dollars; and the auditor of public

accounts shall draw his warrant upon the public treasury for the payment of said salaries in equal monthly payments for each month of their respective terms of office.

Not to Impair Jurisdiction of Courts; Concurrent Jurisdiction.

55. This act shall not be construed to take away or impair the jurisdiction of any court of this Commonwealth to hear and determine any proceeding, suit or motion of which it now has jurisdiction, for the enforcement of any fine or penalty against any corporation under the laws of this State, but that the powers and jurisdic-
241 tion of the commission to hear, determine, and enforce such fines and penalties shall be construed to be concurrent.

Powers and Duties Vested in Commission.

56. The commission is hereby charged with all the duties and vested with all the rights, property, functions, and powers heretofore performed, vested in, and exercised by the board of public works, except in so far as the same may be in conflict with the Constitution and laws of this State, and the commission shall particularly perform the duties and exercise the powers heretofore performed and exercised by said board, prescribed in sections fifty-nine to seventy-eight, inclusive, of this act.

The Commission or Some Member to Attend the Sale of Work of Internal Improvement in which the State is Interested.

57. The commission, or some member thereof, shall, and is hereby directed and authorized to, attend the sale of any work of internal improvement in which the State is a stockholder or otherwise interested, whether such sale be made by virtue of mortgage, judgment, decree, or other lien.

When State may proceed against company by *quo warranto* and sell the works for abandonment or failure to use; deed of conveyance to be executed; collection of debts and proceeds of sale; purchaser to become corporation with privileges, &c., of old company.

58. If the works of any internal improvement company be not commenced and be completed within the time prescribed by law, or by its charter, or if after such works be completed, the company abandon them, or for three successive years cease to use and fail to keep them in good repair, in each of these cases the State may proceed against such company by writ of *quo warranto*, or infor-
242 mation in the nature of a writ of *quo warranto*, and if in any such proceeding there is a judgment against the company, the commission shall forthwith take possession of its work and property and sell the same (except the debts owing to the company), and convey the works and property so sold to the purchaser thereof as soon as the purchase money has been paid, the deed of conveyance to be executed by the chairman of the commission under

its seal. The commission shall, moreover, collect, as far as practicable, the debts aforesaid, and apply the proceeds thereof, and of the said sale, after deducting the costs and expenses of the collection and sale, to the discharge of the liabilities of the company, and whatever remains after said liabilities are discharged, pay into the treasury of the State. Upon such conveyance to the said purchaser, he shall forthwith be a corporation by any name which may be set forth in such conveyance, or any writing signed by him and admitted to record in the county or corporation wherein the conveyance shall be admitted to record; and to the corporation thus created all the provisions of section twelve hundred and thirty-four of the Code shall apply, except that the franchises, rights, and privileges to which such corporation shall succeed and the duties which it shall perform, shall be such as would have been had or performed by the first company but for the judgment aforesaid in the proceeding by writ of *quo warranto*, or information in the nature of a writ of *quo warranto*, save only as in said section provided.

The Commission May Convey State's Interest in Road to County.

59. It shall be the duty of the commission, with the consent of the board of supervisors of any county given at any regular meeting by a two-thirds vote of all elected in such county, where in their opinion the public interest will be promoted thereby, to transfer and convey the State's interest in any turnpike or plank road, or any part thereof, to the county or counties in which said road lies. The transfer shall be made by a formal order to be entered upon the minutes of the proceedings of the commission, and a copy to
243 be transmitted by its clerk to the clerk of the circuit or county court for record in the clerk's office in each county where the said road lies.

The Commission to Collect Dividends, &c., from Work in which State is Interested.

60. The commission shall be vested with power to collect any fund or dividend due from any work of internal improvement in which the State is interested, and to pay the same into the treasury to the credit of the sinking fund.

Proxies for Stock Held by State.

61. The commission, for all works in which the State may hold stock heretofore subscribed and not disposed of, shall from time to time appoint one or more proxies to represent the stock held by or on behalf of the State in the company having control of such work: provided, that the present proxies shall hold over until their successors are appointed.

Duty of State Proxies.

62. In cases in which it may be desired by the commission, its proxies shall cause to be transmitted to it copies of the reports of the proceedings of the directors of the companies in which they are

proxies, the proceedings of the stockholders thereof, and other documents relating to the works, and shall make such reports as the commission may require or to the proxies may seem proper.

State Directors.

63. In every company to the stock of which the board of public works or the State has heretofore subscribed and which has not been disposed of, the commission shall appoint such portion of the directors as shall bear to the whole number of the directors of such company the same proportion, as nearly as possible, that the
244 stock held on behalf of the State in such company bears to the whole capital stock thereof.

When Appointed.

64. The appointment of directors in a company, according to the preceding section, shall be made by the commission before each annual meeting therein.

Terms of Directors and Proxies.

65. Proxies and directors appointed by the commission shall be in office from the time such appointment is in force until their successors are appointed, unless sooner removed. When a proxy fails to attend at any meeting, the commission, without removing him, may make a temporary appointment, to be in force during his absence.

The Commission to Keep Register of the Property of the State.

66. The commission and the second auditor shall cause to be registered, in books to be kept in their respective offices for the purpose, all claims, stocks, bonds, choses in action, and all property, real or personal, due or belonging to the State, with such description thereof as will enable easy reference to the same by any State officer or person interested.

Money Recovered by Action in Circuit Court of Richmond.

67. Any money forfeited to the commission, and any money which ought to be paid into the public treasury to the credit of the fund for internal improvement, shall be recovered, with interest on such money from the time the same ought to be paid by motion, after fifteen days' notice, or by action in the circuit court of the city of Richmond. The second auditor shall institute and prosecute in the name of the Commonwealth the proceedings after an order for such motion or action shall have been made by the commission.

245 Agents for the Collection of Debts, &c.

68. The commission may appoint agents for the collection of its debts or claims, and authorize them to secure payment thereof on such terms as it may approve, except it shall not appoint an agent to collect any judgment, fine, or penalty rendered or imposed by the commission.

When Commission May Purchase Estate Taken Under Execution.

69. When the estate of any person taken under execution or for sale under any decree or deed of trust for any such debt or claim will not sell for the amount thereof, the commission may purchase such estate.

May Sell and Convey Any Estate so Purchased.

70. The commission may sell any estate so purchased, at such time and on such terms as the commission may deem advantageous, and the commission shall execute a deed conveying to the purchaser all the interest which the commission may have in such land.

Compensation of Agent Under This Act.

71. For the services of any agent under this act, the commission may allow compensation not exceeding in any case, five per centum on the money actually paid into the treasury.

The Commission to Fix Tolls, &c.

72. Where the tolls of any canal, navigation, or bridge company are not prescribed by its charter, the commission shall fix such tolls as may seem to it reasonable, and may alter the same at its pleasure.

246 Assent by Stockholders to Sec. 65 of This Act.

73. If in any company incorporated and organized before the first day of July, eighteen hundred and fifty, to the stock of which the board of public works or the State has, before or since that date, subscribed, a resolution be adopted in general meeting of the stockholders (by the vote of the majority of the stockholders, other than the State), assenting to section sixty-five of this act, the same shall thenceforth be of the same force in respect to such company that it would be if it had formed a part of the act incorporating such company. If such assent be not given, the votes in the meetings of the stockholders of such company and the appointment of directors therein shall continue to be according to the laws in force on the day before the Code of eighteen hundred and eighty-seven took effect, unless it be a company whose charter is, by the terms thereof, subject to be altered, amended, or modified by the general assembly; in which case the said section sixty-five shall be of the same force in respect to it as if such assent had been given.

Sale by James River and Kanawha Company of Its Works, &c., to Richmond and Alleghany Railroad Company.

74. That so much of the act entitled "an act to authorize the James River and Kanawha Company to make sale and transfer of all its works, property, and franchises to the Richmond and Alleghany Railroad Company, and to define the powers and duties of the board of public works in reference thereto," approved February twenty-seventh, eighteen hundred and seventy-nine, as has not been carried into effect, shall continue in force, and the commission shall exercise all the powers and perform all the duties conferred and imposed upon the board of public works by the said act.

The Commission to Make Report Showing Condition of Work or Company in Which State Has an Interest.

75. The commission shall make report to the general assembly at each regular session, showing the condition of each work made on the State account, or to the stock of which the board
247 of public works or the State had heretofore subscribed, and giving such other information in relation thereto as it may deem pertinent. And the second auditor shall also report to the general assembly, at such regular session a succinct statement relative to every such work, showing the gross amount of the year's income therefrom, the net balance of such income remaining, after paying current expenses, and interest on debts due on account of the work, and what percentage, such net balance is on the capital expended. On or before the first day of October the said reports shall be delivered to the superintendent of public printing, and he shall cause the same to be printed.

76. That subsection twelve of section one hundred and eighty-three, and sections twelve hundred and twelve, twelve hundred and thirty-six, twelve hundred and thirty-nine, twelve hundred and fifty-four, twelve hundred and ninety-eight, twelve hundred and ninety-nine, thirteen hundred, as amended by an act of the general assembly, approved March fourth, nineteen hundred; thirteen hundred and one, thirteen hundred and two, thirteen hundred and three, thirteen hundred and six, thirteen hundred and seven, thirteen hundred and eight, thirteen hundred and ten, thirteen hundred and eleven, as amended by an act of the general assembly, approved March fourth, nineteen hundred; thirteen hundred and twelve, thirteen hundred and thirteen, thirteen hundred and fourteen, thirteen hundred and fifteen, thirteen hundred and sixteen, thirteen hundred and seventeen, thirteen hundred and eighteen, thirteen hundred and nineteen, thirteen hundred and twenty, thirteen hundred and twenty-one, thirteen hundred and twenty-two, thirteen hundred and twenty-three, thirteen hundred and twenty-four, thirteen hundred and twenty-five, thirteen hundred and twenty-six, thirteen hundred and twenty-seven, thirteen hundred and twenty-eight, thirteen hundred and twenty-nine, thirteen hundred and thirty, thirteen hundred and thirty-one, thirteen hundred and thirty-two, thirteen hundred and thirty-three, and thirteen hundred and thirty-seven of the Code of eighteen
248 hundred and eighty-seven, and sections eleven, twelve, and thirteen of the act of the general assembly of Virginia, approved March third, eighteen hundred and ninety-two, entitled an act to further regulate and control common carriers doing business in this State, and further defining the duties of the railroad commissioner in relation thereto, be, and the same are hereby, repealed.

77. This act shall be in force from its passage.

COMMONWEALTH OF VIRGINIA:

I, D. Q. Eggleston, Secretary of the Commonwealth of Virginia, and keeper of the seals thereof, do hereby certify that the foregoing (excepting the headings to the sections thereof) is a true copy of an act of the General Assembly of Virginia, entitled "An act to put

into effective operation the provisions of the constitution relating to the creation, appointment and organization of the 'State Corporation Commission,' its jurisdiction, powers, functions and duties; the qualifications of the members and officers thereof, their appointment and salaries; the location of its offices and places and times of its public sessions; its writs, processes, orders, findings and judgments; appeals from its orders, findings and judgments, and its expenses, etc.," approved April 15, 1903, as the same is published according to law; that said act is still in full force and effect, and has been so continuously since prior to January 1st, 1904.—with this exception, that, by an act approved March 15, 1906, section 58 of the foregoing act was amended, and that said section is printed above as it reads after, instead of before, its amendment.

Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this 25th day of June, in the year of our Lord nineteen hundred and seven.

[Lesser Seal of the Commonwealth.]

D. Q. EGGLESTON,
Secretary of the Commonwealth and Keeper of Seals.

249 DEFENDANTS' EXHIBIT No. 3.

COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

CITY OF RICHMOND, *Tuesday, Oct. 6*, 1903.

The Commission having, as required by law, formulated a set of Rules of Practice and Procedure, in cases and proceedings before it, it is ordered that the same become operative on and after this date, and that they be spread in full upon the minutes of the Commission, and being so recorded in the Order Book, are in the words and figures following, viz:

Rules of Practice and Procedure Before the State Corporation Commission of Virginia.

Public Sessions.

1. The regular Public Sessions of the Commission, sitting as a court, for the hearing of contested cases and matters properly coming before it, will be held at its offices, in the City of Richmond, on the second Monday in January, April, June, September and November in each year. These sessions may be adjourned from time to time, and shall last so long as the business before the Commission, and the public interests may require. These sessions may be adjourned, during their respective terms, to any other place in the State, upon order of the Commission, that the public necessity or the convenience of the parties require an adjournment.

Special judicial sessions of the Commission may be held at any time upon order of the Commission, or a majority of its
250 members, in the City of Richmond, or elsewhere in the State, for the hearing of all matters over which the Commission has jurisdiction.

Parties.

2. All complaints, proceedings, contests, or controversies, before the Commission, shall be instituted in the name of the Commonwealth, as complainant, and the party against whom the complaint is preferred, or the proceeding instituted, shall be the defendant; in all proceedings instituted by the Commission of its own motion, the complainant shall be, "The Commonwealth at the relation of the State Corporation Commission"; in all other complaints and proceedings, instituted by parties, the complainant shall be styled "The Commonwealth at the relation of ——."

Any person, firm, corporation, or association, or any commercial body, may institute a complaint before the Commission. When instituted by an unincorporated association or mercantile body, the complaint must be in the name of a committee of not less than two persons on behalf of such association or body.

When the complaint concerns anything done, or omitted to be done, by a single carrier or other corporation, no other need be made a party, but if it relates to joint tariffs, or questions in which two or more carriers or other corporations are interested all such must be made parties. A complaint may embrace several carriers, or lines of carriers, operated separately, in the same proceeding, when the subject matter of the complaint involves substantially the same violation of the law, or of the rules and regulations of the Commission, by the several carriers or lines. Persons or carriers not originally parties may apply, in any pending case or proceeding, for leave to intervene, and to be heard upon the questions involved. Such application must be by petition, verified by oath, which must set forth the petitioners' interest in the proceeding.

251 Petitions and Complaints.

3. All complaints for the redress of alleged grievances or violation of law by the defendant must be in writing and addressed to the Commission. Such petition or complaint must distinctly and plainly set forth the grounds of complaint, the items being numbered, and the petition or complaint must be verified by affidavit. The name of the corporation, or other parties complained against, must be stated in full, and the address of the complainant, with the name and address of his attorney or counsel, if any, must appear upon the petition, where the complaint is made otherwise than on the motion of the Commission.

Notice.

4. The petition or complaint may be filed before the Commission, or with its clerk, and, thereupon, a notice, in the form of a writ, shall be issued, according to law, by the Clerk, directed to the Bailiff

of the Commission or other proper officer, summoning the defendant or defendants to appear before the Commission on the day named therein, which shall not be less than ten days from the filing of the complaint. The said writ and notice, and a copy of the complaint, shall be served upon the defendant or defendants, and return made according to law.

Answers.

5. Upon the day named in the writ, or notice, the defendant or defendants shall file before the Commission an answer in writing, specifically admitting or denying, by items, the material allegations of the complaint, and setting forth the facts which will be relied upon to support any such denial. The answer shall be verified by affidavit, and be signed by the attorney or counsel, if there be such. If the parties are ready, upon the filing of the answer, the Commission may proceed at once to hear the matter of contest. If either party be not prepared for the hearing, then an adjournment may be had
252 and the day for the hearing fixed upon the application of either party, in the discretion of the Commission.

Instead of answering the complaint, defendant or defendants may demur to the same, filing a demurrer in writing on the return day.

Amendments.

6. Upon the application of any party, amendments to any complaint or answer in any proceeding or investigation may be allowed by the Commission, in its discretion.

Stipulations or Agreed Facts.

7. The parties to any complaint or proceeding before the Commission may, by stipulation in writing, filed with the Commission, agree upon the facts, or any portion thereof, involved in the controversy, which stipulation shall be recorded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

Hearings.

8. Upon the filing of the answer, the hearing will proceed at once, or the Commission will assign the time and place for the same. Witnesses will be examined orally before the Commission, unless testimony or facts are agreed upon, as otherwise provided in these rules. The petitioner or complainant must prove the existence of the facts complained of, unless they are admitted, or the defendants be in default by failing to answer. Facts alleged in the answer must be proved by the defendant or defendants, unless admitted by complainant. In cases of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case may require.

253 Depositions and Witnesses.

9. The testimony of any witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Commission after the same is at issue by the filing of the answer. Such depositions must be after notice, and before the officer required and allowed by the statutes of Virginia. Any party, complainant or defendant shall be entitled to process to compel the attendance of witnesses or the production of books and papers before the Commission. Such process will be issued, for proper service and return by the clerk of the Commission, upon application of any party to the proceeding. When depositions are taken they must be returned to the Clerk of the Commission, as depositions are required by law to be returned to the Clerk of a court of chancery.

Argument.

10. Whenever requested by the proper authorities, the Attorney-General of the State may represent the complainant in any proceeding.

Arguments may be made orally before the Commission or written or printed briefs may be filed in any case within such time as may be prescribed by the Commission in such case. For convenience in reading and filing, it is requested that, whenever practicable, in cases of importance, arguments be printed.

Special Matters.

11. In the performance of special functions of a judicial nature, imposed upon it directly by law, and not instituted by any complaint such as the assessment of property of corporations and other like matters, such notices will be given and proceedings be had, as are required by the statutes under which the Commission acts in the performance of such duties.

254 General Business.

12. The offices of the Commission, on the fourth floor of the City Hall of Richmond, will be open for the transaction of business on week days from 9 A. M. to 6 P. M. When the Commission is not in session, applications for charters and all papers to be presented to the Commission, or filed in its offices, may be left with the Clerk. Official communications by mail should be addressed to the "State Corporation Commission," and not to the Chairman or any member of the Commission individually.

COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

CITY OF RICHMOND, *8th of January*, 1906.

The books, papers and records of the State Corporation Commission having been removed from the quarters heretofore occupied by it in the City Hall of the City of Richmond to the rooms assigned

to it for the use of the members and the clerical force of the Commission, including a room assigned to it for use as a hearing or court-room, all in the restored Capitol Building of the State; and the Commission being now in occupancy and possession of the said rooms and said court-room in the Capitol Building;

It is ordered, That the same be and remain its permanent quarters and hearing or court-room until other provision is made by law.

VIRGINIA, *City of Richmond, To wit:*

We, R. R. Prentis and R. T .Wilson, chairman, and clerk, respectively, of the State Corporation Commission of Virginia, do hereby certify that the foregoing is a full, complete and true copy of the rules of practice and procedure before the said Commission;
255 that the said rules, &c., were prescribed and entered of record as above set forth; that, as is above shown, section 12 of said rules, &c., was, in one respect, amended by the foregoing order of January 8th, 1906; and that, with the exception of said section 12, all of the foregoing rules, &c., are now in full force and effect, and have been so continuously since the 6th day of October, 1903.

In testimony whereof, we have hereunto set our hands and affixed the seal of the said State Corporation Commission, this, the 25th day of June, 1907.

[Seal of the State Corporation Commission of Virginia.]

ROBERT R. PRENTIS, *Chairman.*
R. T. WILSON, *Clerk.*

This day, R. T. Wilson, clerk of the State Corporation Commission of Virginia, to me personally known, appeared in person before me, the undersigned, a notary public in and for the City of Richmond, in the State of Virginia, and, before me, in my said city, subscribed and made oath to the foregoing certificate.

In testimony whereof, I have hereunto set my hand and affixed my official seal this, the 25th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

256 DEFENDANTS' EXHIBIT NO. 4.

STATE OF VIRGINIA, *City of Richmond, To-wit:*

This day, R. T. Wilson, to me personally known, appeared in person before me, the undersigned, a notary public in and for the city aforesaid, in the State of Virginia, and made oath before me, in my said city as follows:

That he is now, and has been continuously since the 31st day of July, 1906, the clerk of the State Corporation Commission of Virginia.

That, between the 31st day of October, 1906, and the 27th day of April, 1907, the said Commission was engaged a great number of days, in receiving testimony, hearing argument, and otherwise considering, the matters and things involved in and connected with the

proceeding before said Commission, which may be called the "Passenger Rate Proceeding," and in which the said Commission, on the 27th day of April, 1907, entered its order prescribing the maximum passenger rates to be charged by the several railroad companies mentioned in said order.

That all of the railroad companies mentioned in said order appeared before the said Commission during the course of said proceeding, filed answers in the same, on the 1st day of November, 1906, produced witnesses before said Commission, introduced much documentary evidence, and made elaborate defences therein.

That the oral testimony adduced before said Commission by all of the railroad companies appearing in said proceeding was taken down by stenographers, and thereafter reduced to writing, and such testimony, together with the documentary evidence also introduced in said proceeding, and the evidence in the "Freight Rate Proceeding," next hereinafter referred to, covers several thousand pages.

That, prior to the said 27th day of April, 1907, the said Commission had devoted several months to the hearing of evidence
257 and argument in a proceeding before it, the object of which was to enter an order relating to *freight* charges to be made by the railroad companies which were parties to that proceeding, which may be called the "Freight Rate Proceeding"; that the *Southern Railway Company, Chesapeake & Ohio Railway Co., Norfolk & Western Railway Co., Atlantic Coast Line Railroad Co.*, and *Louisville & Nashville Railroad Co.*, were all parties to said "Freight Rate Proceeding," and not only filed answers, but introduced much testimony therein; that the oral testimony adduced before said Commission by all of the railroad companies appearing in said "Freight Rate Proceeding" was taken down by stenographers, and thereafter reduced to writing, and such testimony, together with the documentary evidence also introduced in said proceeding, covers several thousand pages; that the said evidence in said "Freight Rate Proceeding" was made a part of the evidence in said "Passenger Rate Proceeding," and that all of the evidence referred to in this affidavit is now in the possession and custody of the said affiant, in his capacity as clerk of the said Commission, and is preserved by him to be made a part of the record of said "Passenger Rate Proceeding" when so ordered by said Commission, in case of appeal in said proceeding.

That the signature next hereunto affixed is the signature of the said affiant.

R. T. WILSON.

In testimony whereof, I, the aforesaid notary public, have hereunto subscribed my signature, and affixed my notarial seal, this the 25th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

258 DEFENDANTS' EXHIBIT NO. 5.

VIRGINIA:

Pleas before the State Corporation Commission, at its Court-room in the City of Richmond, Virginia, on the 27th Day of April, 1907.

Judicial Case 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION

v.

STEAM RAILROAD COMPANIES.

Be it remembered, that heretofore, to-wit: on Tuesday, the 31st day of July, 1906, the following notice and order was entered:

Offices of the State Corporation Commission.

RICHMOND, VA., *31st Day of July*, 1906.

To the Several Steam Railroad Companies doing business in Virginia, and all persons interested:

Take notice, that the State Corporation Commission will, in the City of Richmond, on Thursday the first day of November, 1906, at 12:00 o'clock noon, in accordance with authority conferred by the Constitution of Virginia, and the statutes enacted by the General Assembly of Virginia pursuant thereto, hear and consider any objections which may be urged against a rule, regulation, order, or requirement of the Commission, fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one railroad company, or joint transportation over the lines of two or more companies; and whether the contract for transportation of a passenger or passengers be evidenced by an ordinary
259 ticket between stations, by a mileage book, or otherwise; the Commission to have, as authorized by law, the power and authority from time to time, and as often as circumstances may require, to change or revise the rate, or by rules, regulations and requirements to provide for the more convenient and expedient putting into effect and proper observance of said maximum rate. At the said hearing and consideration of the said maximum rate of two cents per mile, the method, time and extent of promulgating and putting into effect the same, will be heard and determined by the Commission, to the end that a maximum rate for passenger transportation may be put into effect and be made applicable to all steam railroad companies doing business in Virginia, and be properly observed by them in the transportation of passengers.

BEVERLEY T. CRUMP, *Chairman;*
H. C. STUART,
JOS. E. WILLARD,
Commissioners.

And at another day, towit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Thursday, November 1st, 1906, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION

v.

STEAM RAILROAD COMPANIES.

NOVEMBER 1ST, 1906.

In the Matter of Prescribing a Maximum Passenger Rate.

The notice in this proceeding, addressed to the several steam railroad companies doing business in Virginia and all persons interested, having been regularly published as prescribed by law once a week for four successive weeks in the Times-Dispatch, a daily news-
260 paper published in the City of Richmond, this matter came before the Commission for hearing on this day. Several of the railroad companies doing business in Virginia appeared before the Commission, by counsel, and answers were filed on behalf of the Atlantic Coast Line Railroad Company, the Norfolk & Western Railway Company, The Chesapeake and Ohio Railway Company, Seaboard Air Line Railway, Virginia and Southwestern Railway Company, Chesapeake Western Railway Company, the Valley Railroad Company and the Baltimore and Ohio Railroad Company operating the Winchester and Strasburg and the Winchester and Potomac Railroad, the Southern Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Washington-Southern Railway Company, and the Virginia and Kentucky Railway Company, and leave was granted to any of the other railroads to file answers herein before the taking of testimony was commenced. Thereupon, the hearing and investigation of the matters involved in this proceeding were continued to Tuesday, th- 4th day of December, 1906, at 11:00 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission, continued by adjournment at the court-room aforesaid on Tuesday, December 4th, 1906, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION

v.

STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *December 4th,* 1906.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in this proceeding on the first day of November, the matter herein involved came on this day to be

heard. Thereupon, the hearing and investigation was con-
261 tinued to Tuesday, the 11th day of December, 1906, at 11:00 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission, continued by adjournment at the court-room aforesaid on Monday, December 10th, 1906, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *December 10th*, 1906.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in this proceeding on the 4th day of December, 1906, the matters herein involved came on this day to be heard. Thereupon, the hearing and investigation was continued to Wednesday the 19th day of December, 1906, at 11 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission, continued by adjournment at the court-room aforesaid on Wednesday, December 19th, 1906, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *December 19th*, 1906.

In the Matter of Prescribing a Maximum Passenger Rate.

262 Pursuant to the order entered in this proceeding on the 11th day of December, 1906, the matters herein involved, came on this day to be heard. Thereupon the hearing and investigation was continued to Wednesday the 16th day of January, 1907, at 11 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Wednesday, January 16th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *16th Day of Jan'y*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in this proceeding on the 19th day of December, 1906, the matters herein involved came on this day to be heard. Thereupon by leave of the Commission, the Norfolk and Southern Railway Company, the Louisville and Nashville R. R. Co. and the New York, Philadelphia and Norfolk R. R. Co. filed their respective answers in writing before the Commission. Thereupon the hearing and investigation in this proceeding was continued to Tuesday the 22nd day of Jan'y, 1907, at 11 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Tuesday, January 22nd, 1907, the following order was entered:

263 No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *22nd Day of Jan'y*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to order entered in these proceedings on the 16th day of January, 1907, the parties again appeared before the Commission on this day and the taking of testimony herein was commenced, testimony being first adduced by the Chesapeake and Ohio Ry. Co.; and not being concluded on this day was adjourned over for further hearing until to-morrow and ordered to be continued from day to day or from time to time until concluded.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Monday, January 28th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, 28*th Day of Jan'y*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in these proceedings on the 22nd day of January, 1907, these proceedings were heard and
264 testimony was taken before the Commission bearing upon the matters at issue herein, by the Chesapeake and Ohio Railway Company and the Norfolk and Western Ry. Co. at public sessions of the Commission held for that purpose on the 23rd, 24th, 25th, of January, 1907, and this day, and testimony not having been concluded at the adjournment of this day, the further taking of testimony and the hearing of all matters involved in this proceeding was continued until Wednesday, January 30th, 1907, at 11:00 o'clock in the morning.

And at another day, to-wit; At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Wednesday, Jaonuary 30th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *January* 30, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in these proceedings on January 28th, 1907, the hearing of the matters at issue herein was resumed on this day. The Seaboard Air Line Railway Company appeared to-day before the Commission and presented testimony on its behalf bearing upon the matter involved in this proceeding. The testimony of said railroad company having been fully heard, the further hearing of this matter and the taking of testimony herein was continued until Tuesday, the 5th day of February, 1907, at 11 o'clock in the morning.

265 And at another day to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Tuesday, February 5th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *February* 5, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in these proceedings on the 30th day of January, these proceedings came on to be heard again this day and the further hearing and taking of testimony was continued until to-morrow the 6th day of February at 11:00 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Wednesday, February 6th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *February* 6, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

266 Pursuant to the order entered on yesterday these proceedings were further heard on this day and testimony was taken before the Commission bearing upon the matters at issue herein, testimony being adduced by the Southern Railway Company, and not having been concluded at the adjournment on this day, the taking of the same and the hearing of all matters involved herein was continued to-day until to-morrow at 11 o'clock in the morning and further ordered to be continued from day to day or from time to time until the further order of the Commission.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room on Tuesday, February 12th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *February 12th,* 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in these proceedings on the 6th day of February, 1907, the further hearing and taking of testimony herein not being concluded on that day was continued at a public session of the Commission held for that purpose on the 8th day of February, the 11th day of February and this day, testimony being heard on behalf of the Southern Railway Company, the Washington-Southern Railway Company and the Virginia and Southwestern Railway Company. The taking of testimony and the hear-
267 ing of the matters involved in these proceedings not being concluded on this day, these proceedings are continued until Tuesday, Feb'y 26th, 1907, at 11 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Friday, March 1st, 1907, the following order was entered:

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *1st Day of March,* 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered herein on the 12th day of February, 1907, the hearing and taking of testimony in this proceeding was resumed on the 26th day of February, 1907, and not being completed on that day was further continued and testimony taken on the 27th day of February and on the 1st day of March and the testimony on behalf of the railway companies which desired to be heard in this proceeding having been completed, the hearing and further taking of testimony herein on the part of the Commonwealth or of any defendant railway companies which may further desire to be heard was continued to a day to be fixed by the Commission of which the parties of record were to be notified.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Wednesday, March 27th, 1907, the following order was entered:

268 No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *March 27th*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Counsel of record having been notified that the hearing and consideration of these proceedings would be resumed on this date the parties appeared again before the Commission and further testimony was taken herein. The hearing not being completed on this day, was adjourned and continued until to-morrow morning at 11 o'clock.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Thursday, March 28th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *March 28th*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

In these proceedings the parties, by counsel, again appeared before the Commission on this day and the further consideration of the matters involved herein was resumed. The testimony was fully completed on behalf of all railroad companies making objections
269 herein and also on behalf of the Commonwealth and all matters at issue on this hearing and in this proceeding were submitted to the Commission for its consideration and decision and for the entry of such rule, regulation, order or requirement as may be deemed just, reasonable and valid herein. The Commission not yet being advised of such proper order, rule, regulation or requirement time is taken to consider thereof.

No. 99.

And at this day, to-wit: At a session of the State Corporation Commission, continued by adjournment at the court-room aforesaid, the following judgment and order was entered:

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *27th Day of April*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

The State Corporation Commission having carefully considered all the proceedings herein, and all the testimony, exhibits and statements adduced and filed before it in this proceeding, and having put its conclusions in writing, which are made a part of the record herein, the Commission, in order to carry out its said conclusions, now makes the following order and regulations and prescribes the following maximum rates to be observed by all the steam railroad companies operating in the State of Virginia, in the transportation of passengers:

1. It is ordered, that on and after the first day of July, 1907, the following steam railroad companies, viz:

Norfolk and Western Railway Company,
270 Chesapeake and Ohio Railway Company,
Atlantic Coast Line Railway Company,
Seaboard Air Line Railway Company,
Southern Railway Company,
Richmond, Fredericksburg and Potomac Railroad Company,
Washington-Southern Railway Company,
New York, Philadelphia and Norfolk Railroad Company,
Virginia and Southwestern Railway Company,
Louisville and Nashville Railroad Company

shall put into effect and observe a maximum rate of two cents per mile in the intra-state transportation of passengers in Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one of the said railroad companies, or joint transportation over the lines of two or more companies; and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than two cents per mile for the transportation of passengers over the lines controlled and operated by them, respectively, except as otherwise allowed in this order, or from time to time, by the State Corporation Commission.

2. It is ordered, that a maximum rate of two and one-half cents per mile for the intra-state transportation of passengers be fixed and prescribed to go into effect on and after the first day of July, 1907, on the following divisions or branches, of the Southern Railway Company, which are now excepted from the operation of the maximum rate of two cents per mile hereinabove fixed.

Norfolk Division, extending from Pinner's Point to Danville, 204 miles, exclusive of so much of the said division as may be in the State of North Carolina;

Franklin Branch, extending from Franklin Junction to Rocky Mount, 37 miles;

Claremont Branch, extending from James River Junction to Claremont, 50 miles.

271 From and after the said date it shall be unlawful for the Southern Railway Company to charge or collect a greater sum than two and one-half cents per mile for the intra-state transportation of passengers over these divisions, or branches, unless otherwise directed, or allowed by the Commission.

3. It is ordered, that on and after the first day of July, 1907, the following steam railroad companies, viz.:

Chesapeake-Western Railway,
Cumberland Valley and Martinsburg Railroad Company,
Danville and Western Railway Company,
Indian Creek and Pound River Railroad Company,
Marion and Rye Valley Railway Company,
Nelson and Albemarle Railway Company,
Valley Railroad Company of Virginia,
Virginia-Carolina Railway Company,
Virginia Southern Railroad Company,
Winchester and Potomac Railroad Company,
Winchester and Strasburg Railroad Company,
Norfolk and Southern Railway Company,

shall put into effect and observe a maximum rate of three cents per mile in the intra-state transportation of passengers in Virginia, and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than three cents per mile for the transportation of passengers over the lines controlled and operated by them, respectively, except as otherwise allowed from time to time by the State Corporation Commission.

4. It is ordered, that on and after the first day of July, 1907, the following steam railroad companies, viz.:

Big Sandy and Cumberland Railroad Company,
Black Mountain Railroad Company,
Interstate Railroad Company,
Lick Creek and Lake Erie Railroad Company,
Mt. Airy and Eastern Railway Company,
New River, Holston and Western Railroad Company,
Potomac, Fredericksburg and Piedmont Railroad Company,
272 Surry, Sussex and Southampton Railway Company,
Tidewater and Western Railroad Company,
Virginia Anthracite Coal and Railway Company,
Virginia and Kentucky Railway Company,
Wise Terminal Company,

shall put into effect and observe a maximum rate of three and one-half cents per mile in the intra-state transportation of passengers in Virginia, and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than three and one-half cents per mile for the transportation of passengers over the lines controlled and operated by them,

respectively, except as otherwise allowed from time to time by the State Corporation Commission.

5. It is further ordered, that in applying the foregoing maximum passenger rates prescribed for the several railroads in Virginia, the railroad companies may charge and collect a minimum rate of ten cents per passenger for any single haul.

6. The payment of fares subject to the maximum rate herein prescribed shall entitle the passenger to the same transportation of baggage as now allowed by the carriers under, and in connection with the present rates and no steam railroad company operating in Virginia shall change or alter the rules governing the rights of passengers with respect to the transportation of baggage in Virginia, without the consent of the Commission first obtained.

7. Steam railroad companies operating in Virginia may charge and collect in addition to regular ticket rates the fixed sum of ten cents from all cash fare passengers who had been afforded reasonable opportunity for purchasing ticket before boarding train; provided that the conductor shall in all such cases deliver to passengers a receipt for the amount collected, redeemable at any ticket office of the company within thirty days from date of issue.

It is ordered, that the clerk of the Commission do forth-
273 with publish this order in full in one of the newspapers of general circulation published in the City of Richmond, once a week -or four consecutive weeks, as required by law.

STATE OF VIRGINIA,
City of Richmond, To-wit:

I, Richard T. Wilson, clerk of the State Corporation Commission, do hereby certify that the foregoing is a true transcript from the judicial order book of the State Corporation Commission, of all orders entered in that certain proceeding lately depending before the said Commission under the name and style of:

Commonwealth of Virginia, at the relation of the State Corporation Commission,
v.
Steam Railroad Companies.

and designated in this office as judicial record 99.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the State Corporation Commission this 25th day of June, 1907.

R. T. WILSON, *Clerk.*

[Seal of the State Corporation Commission of Virginia.]

274 This day, R. T. Wilson, clerk of the State Corporation Commission of Virginia, to me personally known, appeared in person before me, the undersigned, a notary public in and for the City of Richmond, in the State of Virginia, and, before me, in my said city, subscribed and made oath to the foregoing certificate.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this, the 25th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

275 *Opinion Referred to in Foregoing Order.*

Passenger Rate Case.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
vs.
STEAM RAILROAD COMPANIES.

In the Matter of Fixing a Maximum Passenger Rate.

Conclusions of the Commission.

Relative to the proceedings to be observed by the State Corporation Commission before it passes upon the reasonableness of any rate which it proposes to put into effect, it is provided in section 156*b* of the Constitution of Virginia, as follows:

tion Commission before it passes upon the reasonableness of any rate which it proposes to put into effect, it is provided in section 156b of the Constitution of Virginia, as follows:

"Before the commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company, or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have
276 process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also as long as it remains in force, be published in each subsequent annual report of the commission."

Proceeding in conformity with the foregoing provision of the organic law of the State, the commission, on the 31st day of July, 1906, issued the following notice:

Notice.

Offices of the State Corporation Commission.

RICHMOND, VA., *31st Day of July*, 1906.

To the several steam railroad companies doing business in Virginia, and all persons interested:

Take notice that the State Corporation Commission will, in the city of Richmond, on Thursday, the first day of November, 1906, at 12 o'clock noon, in accordance with authority conferred by the Constitution of Virginia and the statutes enacted by the General Assembly of Virginia pursuant thereto, hear and consider any objections which may be urged against a rule, regulation, order
277 or requirement of the commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one railroad company, or joint transportation over the lines of two or more companies; and whether the contract for transportation of a passenger, or passengers be evidenced by an ordinary ticket between stations, by a mileage book, or otherwise; the commission to have, as authorized by law, the power and authority, from time to time, and as often as circumstances may require, to change or revise the rate, or by rules, regulations and requirements to provide for the more convenient and expedient putting into effect and proper observance of said maximum rate. At the said hearing and consideration of the said maximum rate of two cents per mile, the method, time and extent of promulgating and putting into effect of the same will be heard and determined by the commission, to the end that a maximum rate for passenger transportation may be put into effect and be made applicable to all steam railroad companies doing business in Virginia, and be properly observed by them in the transportation of passengers.

BEVERLEY T. CRUMP, *Chairman*,
H. C. STUART,
JOSEPH E. WILLARD,
Commissioners.

This notice was published once a week for four consecutive weeks in *The Times-Dispatch*, a newspaper of general circulation published in the city of Richmond.

In accordance with the foregoing notice, the leading railroad companies doing business in the State of Virginia appeared be-
278 fore the commission on the first day of November, 1906, and filed written, or printed, answers, in which were set out in

detail the objections which they desired to urge against the proposed maximum passenger rate of two cents per mile. Following upon the filing of these answers, testimony was introduced before the commission from time to time, and all the issues arising in these proceedings were finally submitted to the commission for its determination on the 29th day of March, 1907.

The commission has given careful consideration to the objections made by the railroad companies involving solely questions of law, and to the most voluminous and detailed testimony adduced before it.

We have first to deal with two preliminary questions of law which are urged by the defendant railroad companies in their answers, and which must be first disposed of, as they challenge the right of the commission to take any action in this proceeding.

It is contended, in the first place, that the provisions of article XII of the Constitution of Virginia, providing for the creation, functions, duties and powers of the State Corporation Commission, are in violation of the fourteenth amendment to the Constitution of the United States, in that those provisions of the Constitution of Virginia, in their execution, deprive the defendant railroad companies of their properties without due process of law, and deny to them the equal protection of the laws. It is contended, in the next place, that as to all the defendant railroad companies whose charters were granted by the State of Virginia prior to the adoption of the new Constitution in July, 1902, there existed a contract between the State and the said railroad companies whereby it was agreed that the State would not undertake to prescribe the tolls or charges upon the said railroad companies, and that the provisions of the Constitution and laws of the State of Virginia conferring upon the State Corporation Commission power to prescribe rates impaired the obligation of that contract, and that hence the commission has no power to fix or prescribe a maximum passenger rate in this proceeding.

279 The first objection above mentioned is based upon the fact that the Constitution of the State, in creating the State Corporation Commission, has conferred upon it judicial, executive and legislative powers; that the commission has authority to consider, prescribe and put into effect rates to be charged by the railroads, and has likewise power, as a judicial tribunal, to pass upon the reasonableness of the rates so proposed by it. The position is taken that a tribunal thus created is unlike the regular courts to which other persons in the State may submit their controversies, and that, in being required to come before such a tribunal, they are denied due process of law, and likewise equal protection of the laws.

It is unnecessary for the commission to consider this objection at length, as it has been recently passed upon by the Supreme Court of Appeals of Virginia. In the case of *Winchester and Strasburg R. R. Co. vs. Town of Strasburg*, decided by the Supreme Court of Appeals of Virginia on December 6, 1906, on appeal from the commission, this question was discussed at length by the court, and the provisions of the Constitution were upheld as valid, and not in violation of the fourteenth amendment to the Constitution of the United States, although the commission had clearly conferred upon it, to a certain

extent, judicial functions as well as legislative and administrative authority.

The second objection urged by the defendant railroad companies as a matter of law is based upon certain provisions of the statutory law of Virginia, which have been in effect for many years, and which are now contained in sections 1202, 1240 and 1242 of the Code of Virginia of 1887. These sections of the Code are portions of the general railroad law of the State. It is provided in section 1240 that the charter of every company, which is governed by an act passed in March, 1837, prescribing certain general regulations for the incorporation of railroad companies, and the charter of every company theretofore or thereafter incorporated, which shall be governed by that chapter, "may be altered, modified, or repealed by any future legislature as may seem to it proper, except that no law
280 shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent, in any other cases than such as are specially provided for in this chapter." In section 1242 it is provided that laws may be passed reducing the tolls of a railroad company when its net profits shall be such that dividends might be declared out of such net profits exceeding the rate of fifteen per centum per annum on the capital stock invested; but that no law shall reduce the tolls so as to prevent dividends at fifteen per centum per annum within thirty years from the time when the first dividends of profits were declared, or so as to prevent dividends of twelve per centum per annum after the said thirty years, and before fifty years from the same time, or so as to prevent dividends of ten per centum per annum after the said fifty years.

It is alleged in the several answers that the railroad companies have not at any time earned such net profits as would enable them to declare the respective dividends mentioned in this statute. It is insisted that therefore, the State has contracted with the railroad companies that no laws should be passed changing their tolls or charges without their assent until such dividends as are contemplated by the statute have been earned. The question before the commission, therefore, is whether such a contract exists, and whether the present provisions of the Constitution of Virginia and the statutes enacted in pursuance thereof constitute an impairment of the obligation of that contract.

We do not deem it necessary to discuss this question at length, but content ourselves with referring to a recent case decided by the Circuit Court of the United States for the Western District of Texas. See *Houston and T. C. R. R. Co. vs. Storey*, 149 Fed. Rep. 499. In that case a bill was filed by the railroad companies to enjoin the enforcement of rates established by the Railroad Commission of Texas. The railroad companies alleged that there existed a contract between them and the State of Texas which precluded the State and
281 the railroad commission from prescribing the rates in question. The section of the Texas statutes relied upon was as follows:

"It shall be lawful for the legislature at any time to prescribe the

rates to be charged for the transportation of persons and property upon any such road, should they be deemed too high, and may exercise the same power every ten years: provided, that no reduction shall be made unless the net profit of the company for the previous ten years, the expenditures of the company being *bona fide* and not with a view to defeat the operation of this section, shall amount to a sum equal to twelve per centum per annum upon its capital stock, and then so as not to reduce the future probable profits below said per centum."

The question of the existence of this contract arose upon a demurrer to the bill, and is not discussed at length by the court. The court refers to *L. & N. R. R. Co. vs. Kentucky*, 183 U. S. 503; *San Antonio Traction Company vs. Altgeld*, 200 U. S. 304, and *Chicago, &c., R. R. Co. vs. Minnesota*, 134 U. S. 455, and holds, upon the authority of these cases, that there was nothing in the charter of any of the companies which expressly or by implication exempted them from liability to future legislation as to the prescribing of rates, and hence no contract between the State and the railroads, respectively, arose; that all the companies, whether chartered by special act of the legislature or under the general laws of the State, took their charters subject to the general law, and to such changes as might be made in the general law, and subject to future constitutional provisions and future general legislation.

In *Louisville and Nashville R. R. Co. vs. Kentucky*, one of the cases relied upon by the Circuit Court, the Supreme Court of the United States says:

"In the absence, then, of any express prior contract between the State and the company exempting the latter from future con-
282 stitutional enactments, and without conceding that even such a contract would avail to relieve the company from constitutional changes in the exercise of the general police power of the State, it is sufficient to say that we do not find in section 218 of the Constitution of Kentucky any impairment of an existing contract between the State and the plaintiff in error."

It will be seen, therefore, that the Supreme Court of the United States does not concede the validity of a contract of this character between the State and a railroad company. This is based upon the general principle that one legislature cannot make such a contract as will prevent subsequent legislatures, or a constitutional convention from the exercise of the police power. This is a question of great importance and interest which it is unnecessary for us to allude to further than to say that, in the present state of the law, this commission must necessarily uphold the right of the State of Virginia to exercise unfettered the police power inherently residing in the State government. An examination of the charters of the several railroad companies which have appeared in this proceeding leads the commission to the conclusion that there is no language in any of them by which a contract, either expressly or impliedly, could be held to have been made with the State whereby the State had relinquished its governmental power to fix and prescribe reasonable rates to be charged by the railroads, with the possible exception of

the charter of the Richmond, Fredericksburg and Potomac Railroad Company. The charter of this company is a very old charter, and it has been held by our State court that, under this charter, the property of the railroad company is exempt from taxation. The power of taxation, however, and the right of the government to prescribe rates rest upon different principles.

The commission overrules the objection that the rate-making power as exercised by the commission in this proceeding constitutes an impairment of the obligation of a contract between the State and the railroad companies as to the Richmond, Fredericksburg and Potomac Railroad Company.

283 It is also to be observed that the charters of some of the defendant railroad companies fall within the scope of the decision of the Supreme Court of the United States in *Norfolk and Western Railroad Company vs. Pendleton*, 156 U. S. 667.

The further objection is made that the adoption and promulgation of the proposed maximum passenger rate would, because many interstate passenger rates are made, and necessarily made, on combinations of locals, or by use of the local rate as a factor, necessarily disturb and regulate the interstate commerce of railroads to such an extent as to come within the purview of the clause of the Federal Constitution relative to interstate commerce. The commission is of the opinion that this objection is clearly untenable.

The defendant railroad companies maintain that a maximum passenger rate of two cents per mile in Virginia would be unreasonable, or confiscatory. It has been strongly contended before the commission, as to each of the railroads involved, that a lowering of the maximum passenger rate in effect upon each of those roads would so affect their earnings as to make the lower maximum passenger rate unreasonable and unjust.

At the same time that the commission has been considering the question of a maximum passenger rate, it has also had before it proceedings having for their object the promulgation and putting into effect of an uniform Virginia freight classification, and freight tariffs thereunder. These two proceedings are designated, respectively, as the passenger rate case and the freight rate case. The freight rate case was taken up first, and by agreement any of the testimony adduced before the commission in that proceeding may be regarded also as testimony in the passenger rate case. So that in passing upon this matter of a maximum passenger rate, the commission will consider the records in both cases and all testimony, exhibits, facts and statements contained in both records, so far as pertinent.

The testimony taken before the commission as to the organization, the financial conditions, the earnings, and the present and future economic conditions of each of the roads appearing before the commission, has been most voluminous, and the commission

284 cannot undertake to analyze and tabulate the testimony in detail. The commission desires, however, before referring to the evidence, to examine briefly the underlying principles, so far as they have been settled, by which the reasonableness or confiscatory character of a rate is to be judged.

By the Constitution and laws of Virginia, the State Corporation Commission is vested with the legislative authority to make a rate. It is settled by statute and by adjudication that the commission has the right, and is constrained by the provisions of our Constitution, to pass upon the judicial question of whether or not the rate proposed by it is reasonable. Under the terms of the Constitution of Virginia, full provision is made for notice to the railroad companies, and every opportunity is given to test before the commission the question of the reasonableness of the proposed rate. There can be no question but that due process of law is afforded to the railroad companies under the procedure by which the State Corporation Commission is bound, and, therefore, the objection sustained in *Chicago, Milwaukee and St. Paul Railroad Company vs. Minnesota,* 134 U. S., 418, does not apply to the method of this commission in prescribing and putting into effect a rate. This commission is required, sitting as a court, to pass upon the judicial question of whether or not the rate proposed by it is reasonable, and from its judgment on that question an appeal is given from it, as a judicial tribunal, to the Supreme Court of Appeals of the State. We are required, therefore, to determine whether or not a maximum passenger rate of two cents per mile in Virginia, in the intra-state business of the railroads doing business in the State, is reasonable, and if not, what maximum passenger rate is reasonable as to all of the roads, or as to the roads placed in several different classes. We must endeavor to determine briefly what are the principles by which the reasonableness of a rate is to be judged, and what the term reasonableness, applied to rates, means as a judicial question.

As we shall see, it is somewhat of a misconception to speak of the rate itself as being reasonable, because the reasonableness of
285 the rate depends in the end upon whether or not the rate is so unreasonably low as to constitute a violation of the rights secured to the railroad by the fourteenth amendment to the Constitution of the United States.

Reduced to its proper analysis, the defense of the railroad companies rests upon their allegation that the maximum rate proposed in this proceeding would so reduce their earnings as to deprive them of a reasonable income from their property without just compensation, and that to so deprive them of a reasonable income without compensation is to deprive them of due process of law within the extended meaning of that term as used in the fourteenth amendment; and that they are denied the equal protection of the laws because they are deprived of a reasonable income from their property without compensation, while other persons receive compensation for property appropriated by the State. The argument is that, to deprive the railroad of a reasonable income from its property, is the same as taking property itself, and this would seem to be true. An unreasonable rate is such a rate as is calculated to reduce the railroad earnings below the point of reasonableness. The term reasonableness, therefore, in the end, applies rather to the earnings of the railroad than to the rate itself. Understood as above stated, it is very common and natural to speak of the rate itself as being reasonable or unreasonable, and is a short method of stating the question as to

whether or not the rate will unreasonably reduce the earnings of the railroad company.

What are the general considerations by which the commission should be guided in determining, from the facts before it, whether or not a maximum passenger rate of two cents per mile will unreasonably reduce the earnings of the railroads and so take their property without just compensation, and deny them the equal protection of the laws?

It is impossible to answer this question briefly, and it is equally impossible to answer it clearly and completely. Being a question arising under the Constitution of the United States, the decisions of the Supreme Court of the United States should be looked to
286 as controlling. Quite a large number of cases have now been decided by that supreme tribunal of the country bearing upon the reasonableness or confiscatory nature of rates prescribed by State legislatures, or by State commissions. A rate which is unreasonable is often termed to be confiscatory, because, if it takes the property of the railroad without compensation, it is in the nature of confiscation. While the doctrines which should control and guide a judicial tribunal in passing upon the question as to whether a proposed rate will reduce the earnings of a railroad unreasonably cannot be said to have been clearly enunciated and well settled, yet the Supreme Court of the United States has, in several cases, been called upon to deal directly with these doctrines. Without referring to all of the cases which have been before that tribunal, we think it may be said that the following are the leading cases in the sense that they mark the several *stadia* in the development of these doctrines:

Chicago, Milwaukee and St. Paul Railroad vs. Minnesota, 134 U. S. 418; *Reagan vs. Farmers' Loan and Trust Company*, 154 U. S 362; *Covington and Lexington Turnpike Road Company vs. Sanford*, 164 U. S. 578; *Smyth vs. Ames*, 169 U. S. 466; *San Diego Land and Town Company vs. National City*, 174 U. S. 739; *Minneapolis and St. Louis Railway Company vs. Minnesota*, 186 U. S. 257.

These cases refer to the intermediate decisions in such a way as to give a very fair presentation of the progress of the court-made law, and of the present condition of the doctrines enunciated by the court on these subjects.

From the cases we deduce the following general principles:

1. The rate enacted by the legislature, or otherwise proposed by the State, stands, as other legislation or action of a State, as valid and constitutional, and hence the burden is upon the railroad company of showing that the rate so enacted or proposed will reduce its earnings to a point which amounts to the confiscation of its property, or to the taking of its property without compensation. *Atlantic Coast Line Railroad vs. Florida*, 203 U. S. 256.

287 2. The railroad company may show that the proposed rate, when applied to its business, will not yield it a reasonable return on the fair value of the property used in the services for which the rate is paid. The return or profit which the railroad company is entitled to must not, therefore, be reckoned upon the capitalization of the company, but upon the reasonable value, or fair value, of the property used by the railroad for the public convenience.

In other words, in considering this question, the real value of the property must be looked to, and not a fictitious value based upon the issuance of securities.

3. The Supreme Court of the United States has repeatedly declared that the railroad's right to earnings must also be limited by considerations relative to the rights of the public. This has been declared in nearly all of the cases above named, and in others. It is held that rates must be just, both to the public and the railroad. Thus, in the Reagan cases, it was stated:

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable."

Again, Justice Harlan, speaking for the court in the Smyth case, said, with reference to the contention that rates ought to permit the payment of dividends as well as of expenses:

"In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation, is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempted from unreasonable exactions, and makes the interests of a corporation maintaining a public highway the sole test in determining
288 whether the rates established by or for it are such as may be rightfully prescribed as between it and the public."

The court in other cases has made numerous utterances to the same effect.

4. Other circumstances and conditions recognized by the court as important in determining the reasonableness of a rate, or of a railroad's income, are economic in their nature, as they pertain to the industrial condition of the country through which the road is built, and other such considerations. In the Minnesota case, reported in 186 U. S. 268, it is suggested that a case may occur in which the condition of the country is such that rates high enough to pay operating expenses would be exorbitant, and would not be justified. While this statement was made in the course of the opinion in a general way, and rather as *obiter dictum*, it shows what a wide scope of consideration the court has in determining questions of this character. In the Reagan cases it was held that, if the road was unwisely built in localities where there is not sufficient business to sustain the road, the public are entitled to reasonable rates, and should not be made to suffer for the bad judgment of the railroad builders, although those rates may not yield earnings sufficient to remunerate the investors. In the Covington case it was held that, although the competition of new lines may reduce the business of the older lines, still the older line would not be justified in making rates unjust to shippers and the public, but must be content with smaller earnings. In the Smyth case the court was called upon to determine the reasonableness of a proposed general freight schedule or tariff of rates. The opinion of the court is based very largely upon tabulated statements showing the average reduction in gross earnings which would

follow from an application of the proposed new freight tariff to the business of the road during the three years preceding. To what extent the court had before it the facts relative to the economic conditions of the country and probable earnings of the roads in
289 the future does not appear. It would rather seem that the evidence, if any, on these questions was very meager, so that the court would not speculate as to the future.

The case this commission is now dealing with relates altogether to a general maximum passenger rate, while in the Smyth case the questions dealt with by the court were greatly complicated by the application of an entirely new freight tariff to the business of the several roads in Minnesota. It is clearly shown in our case that a reduction in passenger rates will produce increased travel, so that the application of the proposed maximum passenger rate to the past business of the companies does not constitute a test which absolutely determines the result of the reduction in the maximum passenger rate. It is manifest that in the Smyth case the court did not have before it the full evidence on this point which has been adduced before the commission. Increased business following a reduction in rates is a circumstance which necessarily has more weight in considering a passenger rate than in considering a system of freight rates; while freight traffic may be somewhat stimulated by a reduction of rates, yet the great bulk of it is controlled by general industrial conditions which apply with a less degree of force to passenger travel.

5. Another matter which is allowed consideration is the character of the administration of the road. If the organization and operation of the road has not been business-like and economical and fair, the company's objection to the rates of the legislature, or of the commission is greatly weakened. In other words, all the expenditures of the company of every character charged against the gross earnings may be carefully examined, analyzed and criticised, as well as all the items coming under the general head of operating expenses. In the Reagan cases it was declared that, if there has been waste in the management of the road, if the company has been paying enormous salaries or has been indulging in unjust discriminations, resulting in general loss, it cannot fairly object to a reduction in its rates. In the Wellman case, 143 U. S. 345, the court declared that they
290 should be fully advised as to what had been done with the earnings of the road, "for if so advised, it might clearly appear that a prudent and honest management would, even under the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends."

The foregoing are some of the leading circumstances and considerations by which we are to be guided in determining what maximum passenger rate would be a reasonable rate to apply to the railroads in Virginia in their intra-state traffic. To undertake to enumerate in great detail all the principles applicable to the rate cases as enunciated by the Supreme Court of the United States would require a most elaborate analysis of the various cases decided by that court, which would extend this opinion far beyond its proper limits. While reasonableness of the earnings of the railroad, which consti-

tutes the crucial test in determining the validity of the proposed rate, must be judged by the principles so far laid down in the adjudications, yet in the end each case must depend upon its own circumstances. As was stated in the San Diego Land and Town Company case, quoting from the Covington case,

"each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating the rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law."

The commission recognizes clearly the general principle established in *Smyth vs. Ames*, which seems to be now fairly well
291 settled; that is, that the railroad company is entitled to a fair return on the reasonable value of its property. What is the reasonable value of the property upon which the railroad company is entitled to the fair return or earnings is to be determined in the light of the general considerations above mentioned, and by all the principles so far laid down by the courts in considering these questions. In *Smyth vs. Ames*, it is stated that in determining the value of the property used in the service of the public, and upon which a return is to be estimated, the following circumstances may be considered:

(1) The original cost of construction;

(2) The present, as compared with the original, cost of construction;

(3) The amount expended in permanent improvements;

(4) The amount, in market value, of the stocks and bonds issued by the corporation;

(5) The probable earning capacity of the road under the proposed rates;

(6) The amount of operating expenses; and

(7) Other matters which may be properly considered, according to the facts in each case.

The last consideration amounts to saying that each case must be judged by its own facts.

It is almost certain that the evidence before the commission presents every possible fact and consideration bearing upon the reasonableness of a maximum passenger rate of two cents per mile more fully and extensively than any of the cases which have been before the Supreme Court of the United States. After listening for several months with great care to the testimony adduced before the commission, and upon careful scrutiny of all facts appearing from the testimony, the tabulated statements and all other data and exhibits filed before the commission, we are of opinion that it will not un-

reasonably reduce the intra-state earnings of railroads in Virginia calculated upon a proper basis, should the commission put
292 into effect a maximum passenger rate less than the prevailing maximum rate, which, as to nearly all the roads, is three cents per mile.

The investigation on which the conclusions of the commission are based was perhaps the most extensive and exhaustive in its scope of any yet undertaken by rate-making bodies. The record in the freight rate cases, covering several thousand pages of typewritten matter, and the exhaustive record in the passenger rate cases, are considered together in so far as either of these records throws light on the subject before us. While the evidence has been carefully considered in its applicability to each individual company and its peculiar conditions, regarded separately, yet we do not deem it necessary or practicable to review all the evidence with the same detail in this paper, but will herein confine ourselves to an application to the evidence of those general principles which the courts have held should control the judgment and discretion of a rate-making body, deducing therefrom such conclusions as are fair, just and reasonable to the several groups of roads and dealing separately with a company only when some peculiar fact or condition differentiates it from the others of the group to which it otherwise belongs.

Proceeding along this line, we recognize not only the binding force, but the justice of the general principle that a carrier has the right to earn its operating expenses, and a fair return upon a fair value of the property used in the service. In order to reach a result in this case which shall conform to this principle, a number of facts must be, as far as possible, ascertained and determined, among the most important of which are:

(1) The gross earnings of the carrier on all its Virginia business, both inter and intra-state;

(2) The expense of conducting such business;

(3) The gross earnings derived from its Virginia intra-state business;

(4) The expense of conducting such purely intra-state Virginia business;

(5) The fair value of the carrier's property used by it in all its Virginia business;

293 (6) The fair value of the carrier's property used by it in its intra-state Virginia business;

(7) A fair and reasonable margin of profit which the carrier should be allowed to earn upon its intra-state Virginia business.

It is manifestly impossible, in the very nature of the case, to ascertain exactly any one (except the third) of the seven matters above enumerated; but the testimony submitted by the defendant carriers in this proceeding, and the facts brought out in cross-examination by members of the Commission and by counsel for the Commonwealth enabled all those matters to be ascertained with sufficient practical accuracy for the purposes of this proceeding.

It may be proper to call attention at this point to the fact that, while the roads generally have stated their passenger *earnings* separately from their freight and other earnings, yet they have, with

perhaps one exception, failed entirely to make any effort at a division between the *expense* of conducting passenger business and that of conducting freight, or other business. Thus we are without such information as will enable us to determine with accuracy the separate net profits of passenger, freight, mail, express and miscellaneous business, respectively. It is, therefore, necessary, in approaching a solution of the question before us, that we consider the earnings of the roads on all Virginia business of every kind on the one side, and the expense incurred in conducting all Virginia business of every kind on the other.

Taking up now the first of the said seven principal matters to be ascertained, namely, the gross earnings of the carrier on all its Virginia business, both inter-state and intra-state, it will be found that the evidence supplying this information, with reasonable accuracy, is furnished not only by the testimony of witnesses adduced in this proceeding, but by the operating reports of the several companies on file in the office of this Commission, and which are made a part of the record in these proceedings.

294 The establishment of the second principal fact above mentioned, viz: the expense of conducting the carrier's entire Virginia business—both inter- and intra-state—has been attempted by all the roads with varying accuracy, though every company has included in its operating expenses items which are not properly so classified.

The third matter, as to earnings derived from all Virginia intra-state traffic, has been satisfactorily fixed, in the case of all the roads appearing in this proceeding by the testimony and statistics in the evidence; and some of the roads have undertaken to state separately their earnings from intra-state passengers and from intra-state freight.

We proceed, therefore, without difficulty until we reach the fourth principal matter, which is as to the expense of conducting purely intra-state business, freight, mail, express, passenger and miscellaneous. A great mass of testimony was submitted by several of the carriers in an effort to show that the cost of conducting intra-state business was materially greater than that of conducting all business, and therefore still greater than that of conducting inter-state business. Some of the roads claimed that this excess of expense on intra-state business was not less than fifteen per cent. of the expense of conducting all business of the system; others claimed that it cost not less than fifteen cents more to earn a dollar on intra-state traffic than on inter-state traffic. Some of the roads claimed that the excess cost was greater than this. It was contended on behalf of the roads that the Supreme Court of the United States had, in the case of *Smyth vs. Ames*, 169 U. S., page 466, established as a matter of law a particular ratio between the cost of different kinds of railroad business. That case, however, does not sustain any such construction, and the evidence in this case fails to show that the intra-state Virginia business of the railroads yields a smaller percentage of profit than does their inter-state business; and the Commission, upon the whole evidence, is of opinion that it is not so.

The argument advanced in support of the opposing theory is

largely based upon the assumption that local traffic and intra-
295 state traffic are interchangeable terms; whereas, as a matter of fact, such is not the case, but, on the contrary, a large amount of intra-state traffic is carried by what might be termed "through movement," while a large amount of inter-state traffic, in whole or in part, by what might be termed "local movement."

It has been held by the Railroad Commission of Wisconsin, after an exhaustive investigation of the subject, that as much intra-state traffic is carried by through movement in that State as is carried by local movement, and that as much inter-state traffic is carried by local movement as by through movement. The evidence in this case shows that the same is very largely true as to Virginia traffic; hence we conclude that any evidence based upon the theory that intra-state traffic is approximately all local, or that inter-state traffic is approximately all through, is necessarily misleading.

It may be admitted, however, that a large proportion of intra-state traffic takes local movement, and is subject, therefore, to the relative high expense of short haul movement; but when we consider that the local or short haul rate is relatively much greater per ton per mile on a purely mileage basis than the through long haul rate, and when to this is added the further fact that the local movements are usually conducted between small points unaffected by competition, while the through movements are usually between large points, and, therefore, more or less influenced by competition, we must see that the excess of the local over the through rate becomes still greater. When we consider these things, it is apparent that the difference in the rate in the two cases is certainly large enough to offset fully any probable difference in the cost of handling and transporting the two classes of traffic. Indeed, the existing short haul rates, which, as just stated, are rarely affected by competition, have always been fixed by the free and voluntary action of the carriers themselves, without restraint, and with a view to covering fully any excess cost which may be incident to traffic moving under these rates; and an examination of the rates applicable to short hauls will show that the traffic departments of the carriers have not been unmindful of
296 the difference between the cost of the short haul local movements on the one side, and the long through movements on the other, even though both movements are performed within the State. As illustrative of this, the testimony of Mr. Coxe, a witness of the Norfolk and Western Railway, shows that the average length of their through hauls was 230 miles, and the average length of their local hauls 68 miles; and the existing tariffs of that road show that the average charge per ton per mile under a 68-mile haul under the class rates is more than double the average charge per ton per mile on a 230-mile haul; and the same comparison when made between commodity rates illustrates the same principle. This is practically true of all the roads. From the evidence in these proceedings and from the considerations aforesaid, the commission finds that the profitableness of conducting intra-state freight traffic is proportionately not materially, if at all, less than the profitableness of conducting inter-state freight traffic.

So much for the freight traffic; but when we consider the pas-

senger, mail, express and miscellaneous business of the roads, the case is much stronger. As a rule, the shorter hauls of passengers are conducted on the regular ticket rates, which are the higher rates; but the assumed additional cost of conducting local *freight* traffic, growing out of the fact that a great part of it must be handled in and out of cars and stations, will not apply to *passenger* traffic, since passengers handle themselves. In addition to this, there are many expenses connected with the through passenger service that are not connected with the local passenger service, such as vastly more expensive train equipment, the maintenance of passenger soliciting offices off the line of the road, the maintenance of a very much higher class of service, &c., &c.

We find that a large amount of intra-state passenger traffic is conducted on through trains, which are claimed to move at a minimum cost per passenger per mile. We find also that a considerable volume of inter-state passenger traffic is conducted on local trains, which are claimed to move at a higher cost per passenger per mile.

From these and other considerations, we cannot escape the
297 conclusion that the Virginia intra-state passenger traffic of each road involved in these proceedings is, in the aggregate, fully as profitable, in proportion, to such road as is its inter-state passenger traffic. As to the mail and express business of the railroads, the evidence is clear, and from the nature of the business it is manifest that the local mail and express business, so far as the railroad company is concerned, costs no more than does the through mail and express business,—the rates being higher, however, on local than on the through, it follows that the local mail and express business of the roads is more profitable than the through.

Finally, the miscellaneous earnings of the road, consisting chiefly of such things as rentals, demurrage, switching, &c., are all purely local, and not, strictly speaking, items of transportation at all, but, in the matter of profitableness, this branch of the road's business is the same whether the traffic upon or in connection with which it is performed, is local or through.

Having seen that, all things considered, the profitableness of intra-state freight traffic in Virginia is proportionately not materially, if at all, less than that of inter-state Virginia traffic; that the profitableness of Virginia intra-state passenger, mail, express and miscellaneous business is proportionately not materially, if at all, less than that of inter-state Virginia passenger, mail, express and miscellaneous business, it follows that the profitableness of the *whole* Virginia intra-state business is proportionately not materially, if at all, less than that of the whole Virginia inter-state and intra-state business combined.

This conclusion is strengthened by consideration of the fact that the great bulk of the inter-state traffic in Virginia is of such character as is moved by the heaviest power and equipment, representing the heaviest burden, and which imposes the necessity for large expenditure of money on road-bed, track, bridges and terminals, thereby increasing the investment in property far beyond the figure which would be necessary if all traffic were of the same character as average

intra-state traffic. To this may be added the fact that the cost of the heavier power and equipment used in transporting average inter-
state traffic is also greatly in excess of the cost of power
298 necessary to, or actually used in, the movement of average
intra-state traffic, to say nothing of the wear and tear on the rails and on the road-bed incident to the movement of heavier inter-state traffic.

Having thus compared the profitableness of Virginia intra-state business with that of Virginia inter-state business, and having seen that there is no material difference in the comparative profitableness of the two, it is plain that the entire operating expense of doing all business in Virginia should be apportioned between inter- and intra-state business, in the proportion which those branches of the road's business bear to each other in amount—that is to say, in the proportion which the gross earnings from inter-state business bears to the gross earnings from intra-state business; and since the intra-state Virginia business contains a larger proportion of short hauls than does the inter-state Virginia business, it follows that the amount of the road's plant—railroad and equipment—employed in earning one dollar of intra-state gross revenue is certainly not more—and is probably materially less—than that used in earning one dollar of Virginia inter-state revenue.

From these considerations it follows that the percentage of the entire expense of all Virginia business which Virginia intra-state business should bear, and the percentage of the entire property of the company employed in its Virginia business, upon which the intra-state Virginia business should be required to yield a fair return, is the same percentage which the gross earnings of the intra-state Virginia business bears to the gross earnings from all the Virginia business. When it is considered that the intra-state and inter-state business of the roads are inextricably mingled, being carried on by the same employees, at the same time, with the same plant and instrumentalities, over the same parts of the road, often in the same train, and not infrequently in the same car—when these things are considered, it is believed that no more fair, just, reasonable and correct basis can be found upon which to apportion the common burden and earning requirements of the whole business between the inter-state and intra-state branches thereof, than the basis above in-
dicated, to-wit, that of gross earnings; and the Commission,
299 from a long and painstaking study of the facts and conditions,
is of the opinion that if this basis is unfair to either branch of the business it is to the intra-state branch.

With a view to the application of this principle of apportionment to some of the principal roads in Virginia, we take the following tables:

1. NORFOLK & WESTERN RAILWAY COMPANY.

Virginia.

Miles operated, 1,054.00 miles.	Year 1906. Per mile of road.
Freight revenue	$12,829 15
Other freight earnings	27 88
Total freight earnings	$12,857 03
Passenger revenue	$2,147 99
Other passenger earnings	408 41
Total passenger earnings	$2,556 40
Total gross earnings	15,413 43
Operating expenses:	
Maintenance of way and structures	$1,721 71
Maintenance of equipment	2,728 25
Conducting transportation	4,459 69
General expense	283 86
Total operating expenses	9,193 51
Net income from operation	6,219 92
Other income from operation	99 93
Total income from operation	$6,319 85
Taxes	440 17
Balance	5,879 68
300 Interest on bonds	1,649 29
Balance for stock	4,230 39
Dividends on stock	1,879 98
Surplus	$2,350 41

2. CHESAPEAKE & OHIO RAILWAY COMPANY.

Virginia.

Miles operated, 736.9 miles.	Year 1906. Per mile of road.
Freight revenue	$10,195 13
Total freight earnings	$10,195 13

Passenger revenue	2,344 56
Other passenger earnings	435 10
Total passenger earnings	$2,779 60
Total gross earnings	12,974 73
Operating expenses:	
Maintenance of way and structures	$1,373 35
Maintenance of equipment	2,338 09
Conducting transportation	3,899 57
General expenses	223 81
Total operating expenses	$7,834 82
Net income from operation	$5,139 91
Other income from operation	230 76
Total income from operation	$5,370 67
Taxes	437 34
Balance	$4,933 33
301 Interest on bonds	3,307 41
Balance for stock	$1,625 92
Dividends on stock	536 76
Surplus	$1,089 16

3. Atlantic Coast Line Railroad Company.

Virginia.

Miles operated, 137.54 miles.	Year 1906. Per mile of road.
Freight revenue	$11,968 96
Total freight earnings	11,968 96
Passenger revenue	2,544 74
Other passenger earnings	319 40
Total passenger earnings	$3,064 14
Total gross earnings	15,033 10
Operating expenses:	
Maintenance of way and structures	$2,161 00
Maintenance of equipment	1,966 64
Conducting transportation	5,651 09
General expenses	417 80
Total operating expenses	$10,196 53

Net income from operation	4,836 57
Other income from operation	623 08
Total income from operation	$5,459 65
Taxes	343 74
Balance	$5,115 91
302 Interest on bonds	1,009 71
Balance for stock	$4,106 20
Dividends on stock	646 59
Surplus	$3,459 61

4. SEABOARD AIR LINE RAILWAY.

Virginia.

Miles operated, 157.50. Year 1906.

	Per mile of road.
Freight revenue	$8,670 70
Total freight earnings	8,670 70
Passenger revenue	1,238 88
Other passenger earnings	453 21
Total passenger earnings	$1,692 09
Total gross earnings	10,362 79
Operating expenses:	
Maintenance of way and structures	$1,020 15
Maintenance of equipment	1,231 65
Conducting transportation	3,882 61
General expenses	207 41
Total operating expenses	$6,341 82
Net income from operation	4,020 97
Other income from operation	78 04
Total income from operation	$4,099 01
Taxes	380 68
Balance	$3,718 33
Interest on bonds	1,076 11
Balance for stock	$2,642 22
303 Dividends on stock	
Surplus	$2,642 22

5. SOUTHERN RAILWAY COMPANY.

In Virginia.

Miles operated, 965.53.	Year 1906. Per mile of road.
Freight revenue	$4,246 10
Total freight earnings	4,246 10
Passenger revenue	2,503 50
Other passenger earnings	962 92
Total passenger earnings	$3,466 42
Total gross earnings	7,712 52
Operating expenses:	
Maintenance of equipment	1,083 69
Maintenance of way and structures	$1,082 65
Conducting transportation	2,595 02
General expenses	248 06
Total operating expenses	$5,009 33
Net income from operation	2,703 19
Other income from operation	183 21
Total income from operation	$2,886 40
Taxes	236 64
Balance	$2,649 76
Interest on bonds	1,393 86
Balance for stock	$1,255 90
Dividends on stock	601 26
Surplus	$654 64

304 6. RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY.

Miles operated, 83.20—all in Virginia.	Year 1906. Per mile of road.
Freight revenue	$12,331 87
Total freight earnings	$12,331 87
Passenger revenue	6,953 07
Other passenger revenue	1,927 28
Total passenger earnings	$8,880 35
Total gross earnings	21,212 22

Operating expenses:	
Maintenance of way and structures	2,021 96
Maintenance of equipment	2,270 25
Conducting transportation	8,708 77
General expenses	560 28
Total operating expenses	$13,561 26
Net income from operation	$7,650 96
Other income from operation	
Total income from operation	$7,650 96
Taxes	10 86
Balance	$7,640 10
Interest on bonds	1,256 25
Balance for stock	6,383 85
Dividends on stock	3,171 16
Surplus	$3,212 69

305 7. WASHINGTON-SOUTHERN RAILWAY COMPANY.

In Virginia.

Miles operated, 33.83.	Year 1906.
	Per mile of road.
Freight revenue	$14,559 14
Total freight earnings	14,559 14
Passenger revenue	6,015 26
Other passenger earnings	2,502 54
Total passenger earnings	$8,517 80
Total gross earnings	23,076 94
Operating expenses:	
Maintenance of way and structures	$1,851 56
Maintenance of equipment	2,410 81
Conducting transportation	12,446 51
General expenses	547 27
Total operating expenses	$17,256 15

Net income from operation	5,820 79
Other income from operation	91 04
Total income from operation	$5,911 83
Taxes	524 34
Balance	5,387 49
Interest on bonds	4,456 24
Balance for stock	$931 25
Dividends on stock	2,177 21
Surplus	

306 8. NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

In Virginia.

Miles operated in Virginia, 95.00.	Year 1906. Per mile of road.
Freight revenue	$13,227 28
Other freight earnings	193 44
Total freight earnings	$13,420 72
Passenger revenue	2,424 11
Other passenger earnings	978 28
Total passenger earnings	$3,402 39
Total gross earnings	16,823 11
Operating expenses:	
Maintenance of way and structures	$2,170 87
Maintenance of equipment	2,257 58
Conducting transportation	6,245 22
General expenses	657 49
Total operating expenses	$11,331 16
Net earnings from operation	$5,491 95
Other income from operation	13 65
Total income from operation	$5,505 60
Taxes	313 23
Balance	5,192 37
Interest on bonds	1,285 71
Balance	$3,906 66
Dividends on stock	1,964 28
Surplus	$1,942 38

307 From an inspection of these tables, it will be seen that the Norfolk and Western Railway Company shows gross earnings for the year ending June 30, 1906, on all its Virginia business, of $15,413.43 per mile, and net earnings on the same business of $5,879.68 per mile, all based upon the freight and passenger rates in effect during that fiscal year. From this it appears that the net income of this line is a little more than 5⅞ per cent. on a valuation of $100,000 per mile of its 1,054 miles of track located and operated in Virginia.

That the Chesapeake and Ohio Railway Company for the same year, figured on the same basis, shows gross earnings of $12,974.73 per mile, and net earnings of $4,933.33 per mile; giving a net income of approximately 5 per cent. on a valuation of $100,000 per mile on its 736 miles of track located and operated in Virginia, some 85 miles of which is mere trackage rights over the lines of the Southern and Washington Southern Railroad Companies from Orange to Washington.

That the Atlantic Coast Line Railroad Company, for the same year, figured on the same basis, shows gross earnings of $15,033.10 per mile, and net earnings of $5,115.91 per mile, giving a net income of approximately 5⅛ per cent. on a valuation of $100,000. per mile of its 137 miles of track located and operated in Virginia;

That the Seaboard Air Line Railway Company, for the same year, figured on the same basis, shows gross earnings of $10,362.79 per mile, and net earnings of $3,718.33 per mile, giving a net income of approximately 3¾ per cent. on a valuation of $100,000. per mile of its 157 miles of track located and operated in Virginia;

The Southern Railway Company, for the same year, figured on the same basis, shows gross earnings of $7,712.52 per mile, and net earnings of $2,649.76 per mile, giving a net income of approximately 2⅝ per cent. on a valuation of $100,000. per mile on the 965 miles of track located and operated in Virginia; the expenses of some 75 miles of which, from Orange to Alexandria, are partly borne by the Chesapeake and Ohio Railway Company;

308 The Richmond, Fredericksburg and Potomac Railroad Company shows gross earnings of $21,212.22 per mile, and net earnings of $7,640.10 per mile, or approximately 7⅝ per cent. on $100,000. per mile of its 83 miles of track located and operated in Virginia;

That the Washington-Southern Railway Company shows gross earnings of $23,076.94 per mile, and net earnings of $5,387.49 per mile, or approximately 5⅜ per cent. on $100,000. per mile of its 36 miles of track located and operated in Virginia, after deducting a grossly exorbitant charge for its interstate traffic over the Potomac River bridge, which, as well as the Washington-Southern Railroad, is controlled by the Pennsylvania Railroad Company;

That the New York, Philadelphia and Norfolk Railroad Company shows gross earnings of $16,823.11 per mile, and net earnings of $5,192.37 per mile, or approximately 5 1-5 per cent. on $100,000. per mile, after making many unusual and unwarranted deductions from net income.

These amounts are based upon the companies' own figures, but in most, if not in all, cases it appears from the evidence that many thousands of dollars included by the roads in these operating expenses and other deductions from gross revenue in order to arrive at their net revenue as they report it, should not, for the purpose of this proceeding, have been deducted from the gross revenue. And the commission finds from the evidence, that, as a matter of fact, the net revenue of each road is more, and in some cases very considerably more, than that reported by them as given in the foregoing tables. In view, however, of the fact that even the roads' own reports of their respective net revenues amply justify the action of the commission in this proceeding, the commission does not deem it necessary in this paper, to discuss or point out the extent to which the real net revenues of the several roads is greater than they calculate and report it.

Assuming, for the moment and for the purpose of comparison, that 6 per cent. is an adequate net return on the value of the property of the roads above enumerated, it appears that this rate is
309 being earned by the several roads on the following valuations per mile respectively, stated in round figures:

Norfolk and Western Railway Company, 6 per cent. on $98,000. per mile.

Chesapeake and Ohio Railway Company, 6 per cent. on $82,000. per mile.

Atlantic Coast Line Railroad Company, 6 per cent. on $85,000. per mile.

Seaboard Air Line Railway Company, 6 per cent. on $62,000. per mile.

Southern Railway Company, 6 per cent. on $45,000. per mile.

Richmond, Fredericksburg and Potomac Railroad Company, 6 per cent. on $127,000. per mile.

Washington-Southern Railway Company, 6 per cent. on $90,000. per mile.

New York, Philadelphia and Norfolk Railroad Company, 6 per cent. on $85,000. per mile.

It must be borne in mind that roadbed and track as shown in miles is not the only investment of these companies; to this chief item of costs must be added also the fair value of equipment, station buildings, freight depots, warehouses and terminals, and any other item of property which *are* necessarily incident to conducting a transportation business. It is difficult to ascertain the exact values of these last named items, but taking the assessed value of these items for taxable purposes in Virginia, as shown by the records of this commission, and distributing this value on a mileage basis, it is found that it only represents the sum of $3,797.78 per mile on the Southern Railway, which is the only road in the group, which is on an earning basis low enough to be possibly affected by this question.

Having shown by the above tables the net earnings per mile of the roads named respectively, on their entire Virginia business, and that no greater percentage of the company's plant is employed in

earning a dollar of intra-state gross revenue than in earning a
310 dollar of interstate revenue, it follows that, if the net earnings of the companies from all their Virginia business, yield them a certain return upon a given valuation of their property employed in earning that revenue (as the figures just given show), then the net earnings upon the intra-state branch of that business must also yield the same return upon a similar valuation of the property employed in earning that intra-state revenue.

We now reach the question as to how far the net income of the several roads as above shown may be regarded as a fair and reasonable return upon a just and fair valuation of the property employed in earning it; and in order to answer this question, we must ascertain and determine what is a fair valuation of such property. Various bases have been suggested and considered by courts and rate making bodies for the ascertainment of the values of railroads and railroad properties.

The bond and stock basis has been suggested; but this is probably the most unreliable and untrustworthy of all measures of value of the property.

The cost of original construction has also been suggested; but this method is subject to various objections, among which is the consideration that the facts from which to determine original cost are usually too remote to be available. Even the cost of reproduction is not always a fair or reliable criterion, seeing that the market price of property, labor and material is a variable and constantly fluctuating quantity; and even if it were not, yet, whether the basis should be the cost of reproduction of the property anew, or the cost of reproduction of the property in its present state, is a question of much difficulty and doubt.

Since the roads by their accounting methods, charge enormous sums annually to maintenance of roadway and structures, and to maintenance of equipment, the aggregate of which sums is annually deducted from the gross revenues in arriving at the reported income, and has been deducted in each case from the net incomes above given, it would seem that they have protected themselves and are continuing to protect themselves financially against the con-
311 sequences of natural depreciation of their property. The evidence shows that as to most, if not all, of the roads, even improvements and betterments were to a greater or lesser extent deducted also from the gross revenues before arriving at the reported income.

Under the laws of this State it was, for many years, the duty of the Board of Public Works, composed of the Governor, the Auditor of Public Accounts and the Treasurer of the Commonwealth, to assess for taxation the value of all railroad property in this State; for four years past this duty has developed upon this commission, which, in the performance thereof, has made careful personal inspections of all the railroad property in the State, and availed itself of every practical source of information as to the true value of that property, and have assessed it as the facts and circumstances of the case would, in their opinion, justify, with a view of deriving there-

from for the State the fair amount of taxes, to which, under the law, it was entitled. In these annual assessments, the interests of the State is naturally in the direction of increasing, while that of the railroad companies is equally in the direction of diminishing, the value of the railroad property, therefore, it would seem but reasonable to assume that the amount of such assessments should certainly not be regarded as unreasonably low, at least so far as the railroad companies are concerned.

The assessment of railroad property in Virginia under the old Board of Public Works was in no single instance more than $15,000.00 per mile, and, under this commission, has never been up to and including the year 1906 more than $16,000.00 per mile on single track roadway proper, and in many instances it is much less.

The Commission does not hold that the taxable value of railroad property and its commercial value is or should be the same, any more than in the case of any other property, but it is manifestly true that such values should bear some reasonable relation to each other, and that the assessed value of such property as ascertained year after year in this State and in many others, where conditions are
312 similar, and with reference to many different roads, should be considered and given due weight—not as alone determining, but—as an element and a very important element in determining the true commercial value of such property. Assessments may indeed be erroneous, but it is wholly improbable that when the assessments made by States for the purpose of taxation are considered with reference to many different years, and for many different roads, it would be found that the State, for every year and every road, has made an error against itself and in favor of the road, and still more improbable would it be that the railroads had first discovered and pointed out the error.

One of the important duties of this Commission is to constantly inspect all the railroads of this State and to keep itself thoroughly posted with reference to the physical condition of the track, roadbed, structures and equipment of such property. This duty has been conscientiously and regularly performed by this body for a number of years. The necessary result of this has been to inform and keep informed this Commission of the condition and value of the railroad property of this State, as fully as any personal knowledge of property could enable one to judge of its value. This personal knowledge the Commission deems it right and proper that it should—not rely absolutely upon, but should—avail itself of in arriving at a fair and just estimate of the true commercial value of the property.

Few or no questions are more delicate or difficult of determination than the true commercial value of railroad property as a proper basis for rate fixing. Many persons have sought to evolve some simple and ready rule for making the estimate, and many different criteria have been suggested; but, in the opinion of this Commission, there is no single element or consideration which can be accepted as a safe or reliable guide, but that due weight and consideration must be given to many different ones.

The law as laid down by the courts requires the ascertainment of *some* value of the property as a basis upon which, as a matter of constitutional right, the company is entitled to earn a fair
313 return—in any event, at least so far as that can be done with reasonable rates. The law must contemplate then that there is some practicable method by which this value can be ascertained, and this Commission knows of no better, or more reliable method than to give due and proper consideration and weight to the following matters among others.

1st. The original cost of the property so far as it is shown.

2nd. The amount of the capital and bonded debt of the company applicable to the property in this State.

3rd. The market value of such stock and bonds.

4th. The cost of reproducing the property anew so far as it is shown.

5th. The cost of reproducing the property in its present condition so far as it is shown.

6th. The properly assessed value of the property for purposes of t-xation.

7th. The personal knowledge of the property by the Commission.

No one of these considerations should control, but due weight should be given to each. That some are entitled to much more weight than others is obvious, and that some are more easily ascertainable than others is equally obvious. For instance, the original cost of a railroad and its equipment is often absolutely unascertainable, and it is wholly impracticable to ascertain the cost of reproduction—either anew or in its present condition. Even if all of these matters were known, they could not safely be relied upon absolutely, because in many cases, particularly in this State, the property was acquired by the present owner at much less than its original cost or at which it could now be reproduced in any form.

Probably the most unreliable and misleading of all the foregoing considerations is the amount or present market value of the stock and bonds of the road. It is well-known that railroad stocks are rarely, if ever, issued for full value. In fact the general rule is that the money put into railroad property is wholly represented by its bonds, the stock being issued as a bonus and represents the
314 control, rather than the contribution to the property. Even when this is not fully true, it is impossible to tell to what extent it is true, especially when the present company, as is often the case, is the result of the merger, consolidation or re-organization of one or more corporations. Nor should the present market value of the stock at all be a controlling guide; because that value is constantly fluctuating, is readily and often manipulated, and depends much more upon the earning capacity of the road than upon the value of the property employed. It would, therefore, be but reasoning in a circle to fix the earning capacity by the value of the property employed, and then, in turn, ascertain that value by the earning capacity as reflected in the market value of the securities.

These are the considerations which have led the Commission to consider all the foregoing matters as well as everything else in the evidence tending to throw light upon the question, but to give

varying weight to each consideration, their final judgment being a composite result of them all.

By this process, the Commission has arrived at the conclusion that the entire Virginia property of no railroad company assessed by it is really worth more than $50,000.00 per mile for the entire mileage in this State, while the property of most of such companies is worth less. The Southern Railway Company's entire property, composed as it is, largely of branch lines of cheap construction and not well maintained, on which is operated light and rather cheap class of equipment, is, in the opinion of the Commission, worth greatly less on its entire mileage in this State. The assessments of the property of the Southern Railway, made by the Commission for the year 1906, are as follows:

Roadway and track	$11,348.15 per mile.
All other property	3,797.78 per mile.
Total assessment of physical property	$15,145.93 per mile.

315 The Virginia revenue law provides for the payment annually of a franchise tax at a rate of one per cent. on Virginia gross transportation receipts of the railroads. If we consider the amount of this franchise tax paid by the Southern Railway to the State, and capitalize it on the basis of $1.25 per $100.00 (estimated to be the minimum average rate of taxation in Virginia, State, county and municipal, on property generally), we would have the additional sum of $5,708.45 per mile. Adding this sum to the assessed value of all the physical property above given, we have a total valuation of $20,854.38 per mile, reached upon a basis which puts the Southern Railway upon the same plane as other tax payers of the State. The Commission is clearly of opinion that the franchise tax should not be considered in this connection, and only includes it in the figures above given for the purpose of showing the outside valuation of the Southern Railway for taxable purposes from any standpoint from which the subject might be considered.

The Commission does not propose to fix for each road, or any of them, the *least* sum to which they could be restricted as a basis for earning capacity, without transgressing the constitutional limit of confiscation. As to how far this side of that limit the regulation should stop, is, in the opinion of the Commission, a matter of legislative discretion to be exercised by it as it deems wisest and best for the public welfare, not overlooking the fact that the railroads themselves and the holders of their securities are a part, and a very important part of that public.

In the exercise of this discretion, the Commission deems it the height of unwisdom and mistaken policy to restrict the railroad companies to the utmost point legally permissible or anywhere near that point. On the contrary, the Commission deems it manifestly wise and proper that the railroads, as one of the greatest engines of civilization and prosperity, on the successful operation of which practically every industry and every community is largely dependent,

should be given every reasonable encouragement and dealt with as liberally as the public interests and the welfare of their patrons will permit.

316 The Commission, therefore, in its final action in these proceedings has been guided by these considerations and has decided upon the reduction in the maximum limit to passenger fares which it orders only after assuring itself, that, even if such reduction is not fully compensated by the consequential increase in business the roads will still be left, upon their intra-state Virginia business, such a margin of profit upon any fair value of the property employed as will enable their business to compare favorably in profitableness with any of the large, or standard, businesses of the country, and not even approach anywhere near the legal limit of confiscation.

But the Commission is convinced from the evidence in these proceedings, that this reduction in the maximum limit of passenger fares, when put into effect in good faith by the carriers, will not result in such a loss of revenue as would first appear from a consideration of the difference between the present maximum and the one proposed.

No branch of transportation is so responsive to lower fares as the carrying of passengers. Of course, there is a certain amount of travel which is compelled to move regardless of fares; but a very large amount of railroad traveling is the direct result of attractive rates which enable and encourage people to move about. None are better aware or more appreciative of this fact than the railroad companies themselves, who, to encourage and increase this travel, have for many years voluntarily sold a large part of their transportation at very much less than the existing maximum limit of three cents a mile. In fact, the evidence shows that but a comparatively small part of the rates actually realized are as much as three cents, and that a very large part of them have long been from two cents a mile down. In States where a maximum limit has been established by law within the last one or two years, some roads have voluntarily withdrawn all their previously existing rates of less than two cents, thus cutting themselves off from the benefit of all the traffic for which these low rates were designed, and which moved only because of it.

317 These lower rates consisted for the most part of excursion rates and special rates to fairs, conventions, and other public gatherings. It is perfectly obvious that the roads had theretofore granted these lower rates because of the plain business considerations that it was better to carry the people, for whom these fares were designed, at these low rates than not at all, and that this kind of passenger traffic only moved under and because of these low rates, in view of the fact that it was not obliged to move at all. These considerations are obvious just as applicable and controlling under a two-cent maximum as under a three-cent maximum, and therefore those roads which, for any reason, withdrew their former rates of less than two cents, did so voluntarily and not because the two cent limit required or forced them to it, and thus by their own act deprived themselves of that large and profitable part of their passenger traffic which only moves because of these low rates. Except when this was done, the evidence fails to show that any standard

road has suffered any substantial diminution, but shows that some of them have derived a positive increase, of their passenger revenues under a two-cent maximum fare as compared with their revenues under a three-cent maximum fare.

After a careful study of the evidence and of the entire railroad situation in this State, the Commission believes, under the maximum limit of passenger fares as prescribed by it in this proceeding,

First. That the revenues of the railroad companies affected will not be necessarily diminished as compared with their existing revenues, but may be increased;

Second. That, if their revenues be in fact diminished thereby, they will not be sufficiently diminished to work any unjust or unreasonable deduction in their net earnings; and

Third. That since the effect of such maximum limit will not be to work a greater reduction in the companies' net earnings than they could be just and reasonably called upon to bear, such reasonable reduction should be applied as far as practicable, to such rates as are best able to bear it, and most generally affect public interest. Applying this principle to the evidence in the case, so far as
318 adduced, we reach the conclusion, and there is little, if any, evidence to the contrary, that it is proper to make the bulk of reduction in passenger fares, especially since such reduction will be more surely and readily compensated for by increased business, than if a similar reduction had been made in other classes of traffic. The increased passenger revenues which must necessarily result from the withdrawal of free transportation under the operation of recently enacted laws, may be an item worthy of consideration in this connection.

So long as a company earns a satisfactory net profit from all of its intra-state business, taken in its entirety, it cannot legally or reasonably complain that more of this profit is earned out of one particular branch of that business than out of some other branch. As to which branch of intra-state business, or what particular item or items of transportation, should bear the heaviest, and which the lightest burdens, considered from the standpoint of public interest, is for the commission, and not for the railroad companies to decide, so long as the aggregate net revenue left to the companies is adequate, just and reasonable.

The commission is of opinion that a maximum rate of two cents per mile for the transportation of all intra-state passengers is not unreasonably low for the roads enumerated in the tables above given, numbered from 1 to 8, inclusive, considering the proportionate value of the property used by them in intra-state business and the character of service rendered to intra-state passengers. These roads will be specified by name in general schedule "A," hereinafter appearing. This conclusion is based upon the business of the roads, respectively, as shown by the evidence in this case, and by the operating reports for the years 1905 and 1906. It is true that the net earnings of the several railroads enumerated in this group are variable as to amount, and the presumption might arise that the roads showing the smaller earning power should not be classed with those showing the larger. We feel that this view is defeated by the fact that the larger

319 earning roads, with one or two exceptions, are using property of much greater value per mile than that used by the smaller earners. In view, however, of the fact that the net income per mile of the Southern Railway Company is small in comparison with the other roads in the same group, it is deemed reasonable to allow, and there will accordingly be allowed, a maximum rate of two and one-half cents per mile for intra-state passengers transported on the following divisions, or branches, of the said Southern Railway Company, viz:

Norfolk Division, extending from Pinner's Point to Danville, 204 miles;

Franklin Branch, extending from Franklin Junction to Rocky Mount, 37 miles;

Claremont Branch, extending from James River Junction to Claremont, 50 miles.

So that the two and one-half cent rate will apply to 291 miles, or 30 per cent. of Virginia mileage of the Southern Railway Company.

From a careful consideration of the evidence in this case, and of the operating reports of the Virginia and Southwestern Railway Company, and Louisville and Nashville Railroad Company, we feel constrained to include, and accordingly will include them in the group of roads which are limited to a maximum passenger rate of two cents per mile. The operating reports of these two roads, on their face, might not seem to justify this reduction; but the facts appearing on cross examination relative to the method of accounting in use by these two roads fully justify a reduction of their passenger rates to two cents per mile, and they will so appear in general schedule "A."

The commission is further of opinion that a maximum passenger rate of three cents per mile should be observed as to intra-state passengers by the Winchester and Potomac Railroad Company, Winchester and Strasburg Railroad Company, and the Valley Railroad Company of Virginia. It having appeared in the evidence that a mileage book is sold by the Baltimore and Ohio Railroad Company at a rate of two cents per mile, available on these three roads, it is thought that this voluntary reduction, taken in connection
320 with the slight one herein made, is as much as the financial showing of these roads will justify at present. These roads appear in general schedule "B." In this connection it might be proper to state the net income of these three roads from all sources for the year ending June 30, 1906, as shown by the operating reports on file in this office, are:

Valley Railroad Company of Virginia, 6 per cent. on a valuation of $14,000 per mile.

Winchester and Potomac Railroad Company, 6 per cent. on a valuation of $17,500 per mile;

Winchester and Strasburg Railroad Company shows a deficit after paying operating expenses.

If we treat these three lines as a part of the Baltimore and Ohio System, and consolidate their earnings, we find that under the maximum passenger rate of three and one-fourth cents now in effect on

these roads, the Baltimore and Ohio net earnings from all Virginia business, inter- and intra-state, is on a basis of 6 per cent. on less than $14,000 per mile. The fact that the Baltimore and Ohio Railroad Company is a large and powerful system in other States, would not seem to affect the question before us, at least from the standpoint of the legal limitations of the rate-making power of Virginia.

These statements are not regarded by the commission as fairly representing the earnings of these roads, but, even when properly analyzed, are not such as to justify further reduction at present.

The commission is further of opinion that a maximum passenger rate of three cents per mile should be observed as to intra-state passengers by the Norfolk and Southern Railway Company, and the Virginia and Carolina Coast Railroad Company, now operated by said Norfolk and Southern Railway Company. The net income of the Norfolk and Southern Railway Company from all sources for year ending June 30, 1906, as shown by its operating report on file in this office, is $805.85 per mile, which is on a basis of 6 per cent. on a valuation of about $13,000 per mile. The net income of the Virginia and Carolina Coast Railroad for the same year is very
321 much less. Under these conditions the commission does not feel warranted in reducing the maximum rate on these two roads below three cents per mile. These roads also appear in general schedule "B."

The commission is further of opinion that a maximum passenger rate of three cents per mile should be observed as to intra-state passengers on all roads embraced in general schedule "B," and that a maximum passenger rate of three and one-half cents per mile should be observed as to intra-state passengers on all independent narrow-gauge steam roads, and on all independent broad-gauge roads less than ten miles in length. These roads appear in general schedule "C."

General Schedule Showing Rates of Passenger Fares for the Several Steam Roads Operating in Virginia, as Ordered by the State Corporation Commission.

SCHEDULE A.—(2 CENTS PER MILE.)

Norfolk and Western Railway Company,
Chesapeake and Ohio Railway Company,
Atlantic Coast Line Railroad Company,
Seaboard Air Line Railway,
Southern Railway Company,
Richmond, Fredericksburg and Potomac Railroad Company,
Washington-Southern Railway Company,
New York, Philadelphia and Norfolk Railroad Company,
Virginia and Southwestern Railway Company,
Louisville and Nashville Railroad Company.

Except that a maximum rate of two and one-half cents per mile will apply on the following divisions or branches of the Southern Railway Company:

Norfolk Division, extending from Pinner's Point to Dan-
322 ville, 204 miles, exclusive of so much of the said division as may be in the State of North Carolina.

Franklin Branch, extending from Franklin Junction to Rocky Mount, 37 miles.

Claremont Branch, extending from James River Junction to Claremont, 50 miles.

SCHEDULE B.—(3 CENTS PER MILE.)

Chesapeake-Western Railway,
Cumberland Valley and Martinsburg Railroad Company,
Danville and Western Railway Company,
Indian Creek and Pound River Railroad Company,
Marion and Rye Valley Railway Company,
Nelson and Albemarle Railway Company,
Valley Railroad Company of Virginia,
Virginia-Carolina Railway Company,
Virginia Southern Railroad Company,
Winchester and Potomac Railroad Company,
Winchester and Strasburg Railroad Company,
Norfolk and Southern Railway Company.

SCHEDULE C.—(3 1-2 CENTS PER MILE.)

Big Sandy and Cumberland Railroad Company,
Big Stone Gap and Powell's Valley Railway Company,
Black Mountain Railway Company,
Interstate Railroad Company,
Lick Creek and Lake Erie Railroad Company,
Mt. Airy and Eastern Railway Company,
New River, Holston and Western Railroad Company,
Potomac, Fredericksburg and Piedmont Railroad Company,
Surry, Sussex and Southampton Railway Company,
Tidewater and Western Railroad Company,
Virginia Anthracite Coal and Railway Company,
Virginia and Kentucky Railway Company,
Wise Terminal Company.

323 It has been urged by the carriers that the prices of material and labor have greatly increased during the period of this investigation, and are continuing to increase since the evidence in the case was taken. Examination shows, however, that, in practically all cases, the gross earnings of the roads are also increasing, and that the most that can be said as to this claim, when properly analyzed, is that the profits on increased gross earnings are being absorbed by increased charges for labor and material, though the commission is not prepared to find that even this is wholly true. In the case of some of the roads, such for instance as the Southern, it is found that they are failing to accept and carry much of the intra-state Virginia traffic originating on their lines, or tendered to them by connecting lines, and which is now making urgent demand upon them for trans-

portation. This failure to transport traffic tendered, and naturally tributary to them, is not found to exist on those roads which are conducting the largest amount of business, but on the roads which are handling along their tracks, a volume of traffic below the average. It would appear from the evidence that if many of the roads which complain of lack of revenue would utilize fully, as they should, the improved facilities now owned by them, both of power and equipment, in the transportation of traffic already offered to them, the profit arising from increased business would soon take care of any increase in the cost of material and labor.

The State of Virginia and the whole South is throbbing with energy and enterprise, and teeming with traffic as never before. The field of opportunity for railroad companies has widened and continues to widen beyond the most sanguine expectations of their official heads, and admittedly far beyond their present state of preparedness. We have shown that the net profit arising from the handling of this greatly increased and increasing traffic, even under the reduction herein ordered, will be equal to, if not greater than that enjoyed by other standard and legitimate business in the country. It is inconceivable that the carriers should, under these conditions, find themselves unable to command the financial credit necessary to the performance of their public duties, and to the provision of such increased facilities in the nature of track, terminals and equipment, as may be necessary to keep pace with the expansion of traffic, of which they are to become the beneficiaries.

VIRGINIA, *City of Richmond, To-wit:*

We, R. R. Prentis and R. T. Wilson, Chairman, and Clerk, respectively, of the State Corporation Commission of Virginia, do hereby certify that the foregoing is a full, complete and true copy of the written opinion of the said Commission which is referred to in the last order contained in the foregoing transcript of record, and which opinion, by said order, is made a part of the record of the proceeding in which said order was entered.

In testimony whereof, we have hereunto set our hands, and affixed the seal of the said State Corporation Commission, this the 25th day of June, 1907.

[Seal of the State Corporation Commission of Virginia.]

ROBERT R. PRENTIS,
Chairman.
R. T. WILSON, *Clerk.*

This day R. T. Wilson, Clerk of the State Corporation Commission of Virginia, to me personally known, appeared in person before me, the undersigned, a Notary Public in and for the City of Richmond, in the State of Virginia, and, before me, in my said city, subscribed and made oath to the foregoing certificate.

In testimony whereof I have hereunto set my hand and affixed my official seal this, the 25th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

326 *Affidavit of W. B. Bevill, General Passenger Agent of Norfolk and Western Railway Company, on Behalf of Complainant.*

Filed June 29th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

W. B. Bevill, a witness of lawful age, being duly sworn, deposes and says as follows:

1. That he is the General Passenger Agent of the Norfolk and Western Railway Company and, as such, the duty devolves upon him to make all proper and necessary arrangements for the issuing of tickets to be placed on sale at the offices of the Company; and all instructions and directions in connection with said business are issued, from time to time, from his office and under his direction;

2. Affiant further says that he has been, from time to time, made familiar with the proceedings now pending in the Circuit Court of the United States for the Eastern District of Virginia in a certain equity cause under the style of "Norfolk and Western Railway Company, Complainant, *vs.* Beverley T. Crump, *et als.*, Defendants," which cause is designated as No. 578; and that, for the purpose of being prepared to conduct the business of the Norfolk and Western Railway Company in regard to its passenger fares and tickets

327 in an orderly way, for the purpose of protecting and preserving the status of the said Railway Company as well as of its passengers in Virginia, he has caused to be prepared and will have, at the stations of said Railway Company in the State of Virginia, on the 1st day of July, 1907, the date upon which the order of the State Corporation Commission of Virginia, imposing a maximum passenger rate of two cents per mile, would have taken effect had it not been that a restraining order had been issued in the above mentioned cause,—tickets for sale to which are attached coupons, on which coupons are printed the terms and conditions upon which said ticket and coupon are issued, and which coupon it is contemplated shall be retained by the purchaser and will evidence the fact that he has paid railroad fare between the points designated on said coupon as well as on said ticket at the tariff rate at present in force on the Norfolk and Western Railway; and, in the event it shall be finally determined that the imposition of said two cent maximum passenger rate is a valid and effective requirement, will be evidence to the purchaser of his right to recover the difference between the sum paid for said ticket at said tariff rate and the two cent maximum rate prescribed.

3. Affiant further says that, for the information of the Court, he files and attaches to this affidavit forms of the tickets proposed to be issued and used by the Norfolk and Western Railway Company pending this litigation, which said forms are marked as exhibits as follows:

(1)

To be used only between Stations in Virginia

Norfolk & Western Ry. Co.

_____ 190

ROANOKE

TO

_____

(Via Short Line only)

This Ticket to be sold at regular Tariff rates to Stations to which the Agent has no Card Tickets.

V. P.-1.

963 $ _____

NORFOLK & WESTERN RY. COMPANY

Virginia Ticket Claim Coupon

V. P.-1

Roanoke to

963

To be Retained by Passenger

NOT GOOD FOR PASSAGE

Issued under an order of the Circuit Court of the United States for the Eastern District of Virginia in a suit in equity (No. 578) therein pending between Norfolk and Western Railway Company, Complainant, and Beverley T. Crump, et als., Defendants.

Norfolk and Western Railway Company has, on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated hereon within the State of Virginia to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by the order of the Corporation Commission of Virginia of April 27, 1907, payable only on the order of said court, upon surrender of this coupon in such manner and upon such conditions, when, where and as the said court may by such order impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

In case the ticket with which this coupon corresponds, is presented for redemption, it must be presented at the General Passenger Agent's office, accompanied by this coupon either for surrender or for appropriate notation.

W. B. Bevill
General Passenger Agent.

NORFOLK AND WESTERN RAILWAY COMPANY.

Good for One Continuous Passage

ROANOKE

TO

_____

(Via Short Line only)

When stamped by Agent at first-named Station, and only on train stopping at last-named Station. Redeemable only when accompanied by Claim Coupon.

V. P.-1

963

W. B. Bevill
General Passenger Agent.

To be Used only between Stations in Virginia

AGENT'S STUB.

From _____

To _____

(Via Short Line only)

FORM V. P. 3

3978

Norfolk and Western Ry. Co.

Virginia Ticket Claim Coupon

V. P. 3

963

To be Retained by Passenger

NOT GOOD FOR PASSAGE

Issued under an order of the Circuit Court of the United States for the Eastern District of Virginia in a suit in equity (No. 578) therein pending between Norfolk and Western Railway Company, Complainant, and Beverley T. Crump, et als., Defendants.

Norfolk and Western Railway Company has, on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated hereon within the State of Virginia to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by the order of the Corporation Commission of Virginia of April 27, 1907, payable only on the order of said court, upon surrender of this coupon in such manner and upon such conditions, when, where and as the court may by such order impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

In case the ticket with which this coupon corresponds, is presented for redemption, it must be presented at the General Passenger Agent's office, accompanied by this coupon either for surrender or for appropriate notation.

W. B. Bevill
General Passenger Agent.

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(2)

NORFOLK AND WESTERN RAILWAY COMPANY.

GOOD FOR ONE CONTINUOUS PASSAGE WHEN OFFICIALLY STAMPED

From _____

To _____

VIA SHORT LINE ONLY

On trains scheduled to stop at last named station and within period canceled as per date upon margin.

This ticket is sold at a rate reduced below the Local Fares and its use by the purchaser or holder is an acceptance of its conditions.

150 pounds baggage per ticket is limited to \$100.00 transportation, (unless greater value is declared by the owner and excess charges paid thereon at time of taking passage). The holder of this ticket by presenting baggage for free transportation hereunder agrees that its value is no more than $100.00. The right is reserved by the lines intercarried to check baggage to final destination only.

This ticket is void if any erasures or changes appear upon its face, limit, or destination.

Redeemable only when accompanied by Claim Coupon.

NO STOP-OVER ALLOWED

FORM V. P. 3

W. B. Bevill
General Passenger Agent.

3978

JUL	AUG	SEP	OCT	NOV	DEC	DAY	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
JAN	FEB	MAR	APR	MAY	JUN	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16

1907
1908
1909
1910
1911
1912
1913

To be used only between Stations in Virginia

NOTE--YEAR MUST BE PUNCHED

(4)

STUB O

Norfolk
Burkeville
Farmville
Forest
Bedford
Montvale
Blue Ridge
Bonsack
Vinton
Roanoke
Cloverdale

Norfolk and Western Railway Company.
SUMMER EXCURSION TICKET
STATION PUNCHED ON MARGIN
(Via Short Line only)
1909
V. X. D.

Troutville
Buchanan
Glasgow
Buena Vista
Basic
Elkton
Shenandoah
Front Royal
White Post
Boyce
Berryville

SAMPLE

To be used only between Stations in Virginia

Agent's Stub—Station Excursion Trip Ticket.

(3)

From.....

To.....

AND RETURN.
(Via Short Line only)
AGENT WILL TEAR THIS STUB OFF
Form V. X.

1907	1908	1909	1910	1911	1912	1913	1914	1915

NORFOLK AND WESTERN RAILWAY COMPANY

Station Excursion Trip Ticket

From.....

To.....

(Via Short Line only)

WHEN OFFICIALLY STAMPED

Subject to the following conditions:

It is sold at a rate reduced below the Local Fares, and its use by the purchaser is an acceptance of its conditions.

This Ticket is not transferable and is good only for the Continuous Passage of the original purchaser. GOING trip to begin on date stamped on back and RETURN trip to be made before midnight of date cancelled in margin by selling agent.

Free baggage per ticket is limited to 150 pounds wearing apparel not exceeding $100.00 in value (unless greater value is declared by the owner and excess charges paid thereon at time of taking passage). The holder of this ticket by presenting baggage for free transportation hereunder agrees that its value is no more than $100.00. The right is reserved by this Company to check baggage to final destination only.

This Ticket is void if any erasures or changes appear upon its date, limit, or destination.

This coupon is good only returning to selling station, and not going from it, and only on trains scheduled to stop at last named station.

Redeemable only when accompanied by Claim Coupon.

Read and Understand the Conditions.

No Stop-over allowed.

Form V. X.

W S Bevill
General Passenger Agent.

1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918

NORFOLK AND WESTERN RAILWAY COMPANY

SUMMER EXCURSION TICKET.

WHEN OFFICIALLY STAMPED

(4)

GOOD FOR ONE PASSAGE

BETWEEN

Stations Designated in Coupons Attached

Subject to the Following Contract:

The holder hereof, in consideration of the reduced rate at which this ticket is sold, agrees with the Company to use the same on or before October 31st, of year cancelled in margin hereof and stamped on back, and the holder hereof failing to comply with this agreement, the said Company may refuse to accept this ticket or any coupons thereof, and demand the full regular fare, which the holder agrees to pay.

Free baggage per ticket is limited to 150 pounds wearing apparel not exceeding $100.00 in value, (unless greater value is declared by the owner and excess charges paid thereon at time of taking passage). The holder of this ticket by presenting baggage for free transportation hereunder agrees that its value is no more than $100.00. The right is reserved by the line interested to check baggage to final destination only.

Redeemable only when accompanied by Claim Coupon.

1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918

W S Bevill
General Passenger Agent.

SAMPLE

Norfolk
Burkeville
Farmville
Forest
Bedford
Montvale
Blue Ridge
Bonsack
Vinton
Roanoke
Cloverdale

Norfolk and Western Railway Company.
STATION PUNCHED ON MARGIN
—TO—
STATION STAMPED ON BACK
(Via Short Line only)
This Check is Not Good if Detached from Contract.
1909
V. X. D.

Troutville
Buchanan
Glasgow
Buena Vista
Basic
Elkton
Shenandoah
Front Royal
White Post
Boyce
Berryville

Norfolk and Western Ry. Co.
Virginia Ticket Claim Coupon
V. X.

To be Retained by Passenger
NOT GOOD FOR PASSAGE

Issued under an order of the Circuit Court of the United States for the Eastern District of Virginia in a suit in equity (No. 870) therein pending between Norfolk and Western Railway Company, Complainants, and Beverley T. Crump, et als., Defendants.

Norfolk and Western Railway Company has, on the date stamped hereon, received in connection with the sale of the ticket corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated hereon within the State of Virginia to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by the order of the Corporation Commission of Virginia of April 27, 1907, payable only on the order of said court, upon surrender of this coupon in such manner and upon such conditions, when, where and as the said court may by such order impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

In case the ticket with which this coupon corresponds is presented for redemption, it must be presented at the General Passenger Agent's office, accompanied by this coupon either for surrender or for appropriate notation.

W S Bevill
General Passenger Agent.

Norfolk and Western Ry. Company
Virginia Ticket Claim Coupon
V. X. D.

[redacted]

To be Retained by Passenger
NOT GOOD FOR PASSAGE

Issued under an order of the Circuit Court of the United States for the Eastern District of Virginia in a suit in equity (No. 870) therein pending between Norfolk and Western Railway Company, Complainants, and Beverley T. Crump, et als., Defendants.

Norfolk and Western Railway Company has, on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale for travel between points designated hereon within the State of Virginia to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by the said ticket had been paid for at the rate fixed by the order of the Corporation Commission of Virginia of April 27, 1907, payable only on the order of said court, upon surrender of this coupon in such manner and upon such conditions, when, where and as the said court may by such order impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

In case the ticket with which this coupon corresponds is presented for redemption, it must be presented at the General Passenger Agent's office, accompanied by this coupon either for surrender or for appropriate notation.

W S Bevill
General Passenger Agent.

NORFOLK AND WESTERN RAILWAY COMPANY

Good for One Continuous Passage and on going trip only on date stamped on back.

From.....

To.....

(Via Short Line only)

Only on trains scheduled to stop at last named station. Void after date so stamped and unless used in accordance with conditions thereof.

V. X. THIS CHECK IS NOT GOOD IF DETACHED.

SAMPLE

Norfolk
Burkeville
Farmville
Forest
Bedford
Montvale
Blue Ridge
Bonsack
Vinton
Roanoke
Cloverdale

Norfolk and Western Railway Company.
STATION PUNCHED ON MARGIN
—TO—
STATION STAMPED ON BACK
(Via Short Line only)
This Check is Not Good if Detached.
1909
V. X. D.

Troutville
Buchanan
Glasgow
Buena Vista
Basic
Elkton
Shenandoah
Front Royal
White Post
Boyce
Berryville

To be used only between points in Virginia

Form V. 3-F

Via N. & W.—C. & O.

N. & W. Ry. — Norfolk & Western Ry. Co.

CHESAPEAKE & OHIO RY. LOCAL

Richmond, Gordonsville, Charlottesville, Va., Gordon, Stanton, Clifton Forge, Covington, Va., Newport News, Old Point Comfort

AGENT'S STUB — 1st Class — 2d

Not Good for Passage

Norfolk & Western Ry. Company

Virginia Ticket Claim Coupon

V. 3-F

To be Retained by Passenger

NOT GOOD FOR PASSAGE

Issued under an order of the Circuit Court of the United States for the Eastern District of Virginia in a suit in equity (No. 578) therein pending between Norfolk and Western Railway Company, Complainants, and Beverley T. Crump, et als., Defendants.

Norfolk and Western Railway Company will, on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated hereon within the State of Virginia to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by the order of the Corporation Commission of Virginia of April 27, 1907, payable only on the order of said court, upon surrender of this coupon in such manner and upon such conditions, when, where and as the said court may by such order impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

In case the ticket with which this coupon corresponds, is presented for redemption, it must be presented at the General Passenger Agent's office, accompanied by this coupon either for surrender or for appropriate notation.

W. B. Bevill

General Passenger Agent.

ISSUED BY

N. & W. Ry. — Norfolk & Western Ry. Co.

FOR

One Passage

OF THE CLASS INDICATED ON COUPON ATTACHED

TO

CHESAPEAKE & OHIO RY. LOCAL

When Officially Stamped and Sold by its Agent.

Subject to the Following Contract between the Purchaser and all the Lines Over Which it Reads.

1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918

JAN FEB MAR APR MAY JUN JUL AUG SEPT OCT NOV DEC

1st. In selling this Ticket for passage over other lines and in checking baggage on it, the Norfolk & Western Railway Company acts only as Agent and is not responsible beyond its own line.

2d. This ticket is good for FIRST CLASS passage, unless punched 2d class; if so punched, it entitles holder to the privileges of class indicated only.

3d. If more than one station is designated as destination it will be honored for passage only to the station indicated which is nearest to the starting point of last coupon.

4th. Stop-overs. If allowed at any local point en-route under the local regulations of any line, or at intersecting points, shall not operate in any way to extend the time limit in which this Ticket must be used for passage through to destination.

5th. If limited as to time, it must be used to destination BEFORE MIDNIGHT OF THE DATE INDICATED by punch mark in margin; and it is subject to exchange in whole or part, for a continuous train passage ticket over any or all of the lines over which it reads.

6th. Free baggage per ticket is limited to 150 pounds wearing apparel not exceeding $100.00 in value (unless greater value is declared by the owner and excess charges paid thereon at time of taking passage). The holder of this ticket by presenting baggage for free transportation hereunder agrees that its value is no more than $100.00. The right is reserved by the lines interested to check baggage to final destination only.

7th. This Ticket and Coupons will be void if they show any alterations or erasures, or if more than one date is canceled, and the Coupons will be void if detached.

8th. No Agent or employe of any line named in this Ticket over which the original purchaser is entitled by the terms of this Ticket to travel, has any power to alter, modify or waive in any manner any of the conditions named in this contract.

9th. The right to declare this ticket and any of its coupons forfeited for violation of any of the above conditions, may be exercised by any Agent or Conductor of any of the Lines named in the Coupons.

10th. The use of this Ticket is in itself an acceptance of the conditions of this Contract.

Redeemable only when accompanied by Claim Coupon.

Date of this Sale must be Written with Pen and Ink by Selling Agent.

DATE OF SALE _____ 19__

Coupons to be Detached by Conductors Only.

W. B. Bevill

General Passenger Agent.

ISSUED BY

N. & W. Ry. — Norfolk & Western Ry. Co.

OR ACCOUNT OF

Chesapeake and Ohio Railway

2d Class — 1st

Richmond, Gordonsville, Charlottesville, Va., Gordon, Stanton, Clifton Forge, Covington, Va., Newport News, Old Point Comfort

BASIC to — Station Indicated by Punch Marks.

Form V. 3-F — Worthless if Detached from Contract.

N. & W. Ry. — Norfolk & Western Ry. Co.

(Via Short Line only.)

Richmond, Gordonsville, Charlottesville, Va., Gordon, Stanton, Clifton Forge, Covington, Va., Newport News, Old Point Comfort

BASIC — 1st Class — 2d

Form V. 3-F — Worthless if Detached from Contract.

To be used only from Stations in Virginia

Form V. R. T.-1.

Via N. & W.—A. C. L.—Rosaria.

Norfolk and Western Railway Company

TO

RICHMOND, VA.

AND RETURN

NOT GOOD FOR PASSAGE

AGENT'S STUB

Norfolk and Western Ry. Company

Virginia Ticket Claim Coupon

V. R. T.-1

to RICHMOND, VA.

To be Retained by Passenger

NOT GOOD FOR PASSAGE

Issued under an order of the Circuit Court of the United States for the Eastern District of Virginia in a suit in equity (No. 578) therein pending between Norfolk and Western Railway Company Complainant, and Beverley T. Crump, et als., Defendants.

Norfolk and Western Railway Company will, on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated hereon within the State of Virginia to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by the order of the Corporation Commission of Virginia of April 27, 1907, payable only on the order of said court, upon surrender of this coupon in such manner and upon such conditions, when, where and as the said court may by such order impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

In case the ticket with which this coupon corresponds, is presented for redemption, it must be presented at the General Passenger Agent's office, accompanied by this coupon either for surrender or for appropriate notation.

W. B. Bevill

General Passenger Agent.

ISSUED BY

N. & W. Ry. — Norfolk & Western Ry. Co.

FOR

ONE PASSAGE

OF THE CLASS INDICATED ON COUPON ATTACHED

TO

RICHMOND, VA.

AND RETURN

When officially stamped and sold by its Agent

Subject to the following Contract between the purchaser and all the lines over which it reads.

1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918

JAN FEB MAR APR MAY JUN JUL AUG SEPT OCT NOV DEC

1st. In selling this Ticket for passage over other lines and in checking baggage on it, The Norfolk & Western Railway Company acts only as Agent and is not responsible beyond its own line.

2d. Stop-overs, if allowed at any local point en-route under the local regulations of any line, or at intersecting points, shall not operate in any way to extend the time limit in which this Ticket must be used for passage through to destination.

3d. If limited as to time, GOING PASSAGE must be used from date of sale as stamped and written hereon by selling agent; RETURN PASSAGE must be completed to original starting point BEFORE MIDNIGHT OF THE DATE INDICATED by punch marks in margin) and it is subject to exchange in whole or part for a continous train passage ticket over any or all of the lines over which it reads.

4th. Free baggage per ticket is limited to 150 pounds wearing apparel not exceeding $100.00 in value, (unless greater value is declared by the owner and excess charges paid thereon at time of taking passage). The holder of this ticket by presenting baggage for free transportation hereunder agrees that its value is no more than $100.00. The right is reserved by the lines interested to check baggage to final destination only.

5th. This Ticket and Coupons will be void if they show any alterations or erasures, or if more than one date is canceled, and the Coupons will be void if detached.

6th. No Agent or employe of any line named in this Ticket over which the original purchaser is entitled by the terms of this Ticket to travel, has any power to alter, modify or waive in any manner any of the conditions named in this contract.

7th. The right to declare this Ticket and any of its Coupons forfeited for violation of any of the above conditions may be exercised by any Agent or Conductor of any of the lines named in the Coupons.

8th. The use of this Ticket is in itself an acceptance of the conditions of this Contract.

Redeemable only when accompanied by Claim Coupon.

Date of this Sale must be Written with Pen and Ink by Selling Agent.

DATE OF SALE _____ 19__

Coupons to be Detached by Conductors Only.

W. B. Bevill

General Passenger Agent.

Norfolk & Western Railway Company

PETERSBURG

TO

(Via Short Line only.)

V. R. T.-1 — FIRST CLASS. Forfeited if Detached.

RICHMOND, VA. AND RETURN.

ISSUED BY

Norfolk & Western Railway Company

OR ACCOUNT OF

Atlantic Coast Line Railroad

RICHMOND

TO

PETERSBURG

V. R. T.-1 — FIRST CLASS. Forfeited if Detached.

RICHMOND, VA. AND RETURN.

ISSUED BY

Norfolk & Western Railway Company

OR ACCOUNT OF

Atlantic Coast Line Railroad

PETERSBURG

TO

RICHMOND

V. R. T.-1 — FIRST CLASS. Forfeited if Detached.

RICHMOND, VA. AND RETURN.

Norfolk & Western Railway Company

TO

PETERSBURG

(Via Short Line only.)

V. R. T.-1 — FIRST CLASS. Forfeited if Detached.

RICHMOND, VA. AND RETURN.

Passengers will please not attempt to pull mileage slip from the fastening, leave this to the Conductor.

NORFOLK AND WESTERN RY. CO.

1000-MILE TICKET.

Form V-1000.

Good only between Stations within the State of Virginia.

No. 1183

Mr. _____

Whose signature appears signed to coupon at bottom of slip, is entitled to travel 1000 miles on the Norfolk & Western Ry. within one year from _____ inclusive.

Subject to the conditions of the contract which is attached to and made a part hereof.

General Passenger Agent.

Agent N. & W. Ry. Co.

STAMP HERE.

(Patented October 23, 1894.)

AGENT'S STUB.

Ticket Agent will fill up both stubs and send this part to Auditor's Office at end of the month with Ticket Report.

NORFOLK AND WESTERN RY. CO.

1000-MILE TICKET.

[redacted]

FORM V-1000.

Good only between stations in State of Virginia.

ISSUED TO

OF

By

Agent

STAMP HERE.

CONDUCTOR'S STUB.

Conductor will detach this leaf together with the coupons for the distance traveled, upon first presentation and send same with his other collections to the Auditor's Office.

NORFOLK AND WESTERN RY. CO.

No. 1183

1000-MILE TICKET.

FORM V-1000.

Good only between stations in State of Virginia.

ISSUED TO

OF

By

Agent

STAMP HERE.

1N & W 1183

2N & W 1183 1

3N & 1183 2

4N & 1183 3

1183 4

BAGGAGE

CONDUCTOR'S STUB.
Form P. 10.

FROM

TO

Date 19 $

Norfolk & Western Railway Co.

AUDITOR'S COUPON.

Form P. 10. TO BE RETURNED WITH REPORT

Conductor.

From

To

Train No. 19

95	CENTS	★	10.50	DOLL.	★
90	"	95	10.00	"	10.50
85	"	90	9.50	"	10.00
80	"	85	9.00	"	9.50
75	"	80	8.50	"	9.00
70	"	75	8.00	"	8.50
65	"	70	7.50	"	8.00
60	"	65	7.00	"	7.50
55	"	60	6.50	"	7.00
50	"	55	6.00	"	6.50
45	"	50	5.50	"	6.00
40	"	45	5.00	"	5.50
35	"	40	4.50	"	5.00
30	"	35	4.00	"	4.50
25	"	30	3.50	"	4.00
20	"	25	3.00	"	3.50
15	"	20	2.50	"	3.00
10	"	15	2.00	"	2.50
5	"	10	1.50	"	2.00
★		5	1.00	Coin	1.50

Amount of Cash Fare Collected.

Conductor.

Train No. 19

NORFOLK AND WESTERN RY. CO.

Virginia Agent Claim Coupon

To be Retained by Passenger,
NOT GOOD FOR PASSAGE

NORFOLK AND WESTERN RAILWAY CO.

Conductor's Cash Fare Receipt.

Passengers will please notice that the lower FARE figures in each column show the full amount paid to Conductor.

Form P. 10. Cash Passenger Agent.

☞ This Receipt is of NO VALUE except as a RECEIPT for the TRAIN AND TRIP.

First. "Exhibit No. 1" is the ordinary ticket to be used between stations upon the line of the Norfolk and Western Railway Company in the State of Virginia;

Second. "Exhibit No. 2" is the same form of ticket limited and with certain conditions for a specified time, and is sold at a lower rate;

Third. "Exhibit No. 3" is a form of a local round-trip ticket to be used between stations on the Norfolk and Western Railway in Virginia;

328 Fourth. "Exhibit No. 4" is the usual summer excursion ticket used between points in Virginia with the limitations and conditions attached to such tickets printed thereon;

Fifth. "Exhibit No. 5" is a form of ticket covering travel in Virginia over a portion of the line of the Norfolk and Western Railway Company and some other road in Virginia with which arrangements have been made for through tickets;

Sixth. "Exhibit No. 6" is a round-trip ticket of the same form as Exhibit No. 5;

Seventh. "Exhibit No. 7" is the form of mileage book to be issued, good upon the road of the Norfolk and Western Railway Company in Virginia;

Eighth. "Exhibit No. 8" is the form of receipt to be issued by conductors to passengers who may pay cash fares upon the trains of said Company.

4. Affiant further says that all of the foregoing forms of tickets, which cover the various characters of tickets which are used by the said Norfolk and Western Railway Company in its Virginia business, have been printed and are ready for immediate distribution to the agents and conductors of said Company in Virginia and can be made available in the transaction of the business of the said Company on and after the 1st day of July, 1907, provided that this affiant has notice forty-eight (48) hours before the 1st day of July, 1907, that said forms, as prepared by him and filed herewith, are approved of by the said Court.

And further this deponent sayeth not.

W. B. BEVILL.

STATE OF NORTH CAROLINA,
County of Buncombe, City of Asheville, To-wit:

This day personally appeared before me, in my City aforesaid, W. B. Bevill, who deposes and says that he is General Passenger Agent of the Norfolk and Western Railway Company and that the facts set forth in the foregoing affidavit are true and cor-

329 rect.

Given under my hand and notarial seal, this the 28th day of June, 1907.

[NOTARIAL SEAL.] THOS. A. JONES,
Notary Public, Buncombe County, North Carolina.

My Commission expires, March 11th, 1908.

(Here follow Exhibits Nos. 1 to 8, tickets, marked pp. 330 and 331.)

332 *Decree Directing Coupons to Issue to Purchasers of Tickets, &c., and Continuing Restraining Order Awarded May 15th, 1907.*

Entered and Filed June 29th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

This cause came on this day to be heard upon the Bill of the Complainant heretofore filed on the 15th day of May, 1907, and the restraining order granted in pursuance of the prayer of said Bill, which said restraining order was issued on the date of the filing of said bill and directed the defendants therein to show cause on the 27th day of June, 1907, why an injunction *pendente lite* should not be granted, pending further proceedings in this cause;

And it appearing to the Court that, under the order of the State Corporation Commision of Virginia, issued on the 27th day of April, 1907, it is provided that a two cent maximum rate for passenger fares on the railroad of Complainant is, by the terms of said order, to become effective on the 1st day of July, 1907; and the Court, by reason of the necessity for its consideration of other matters of litigation pending, has not been able to further consider, at this time, the prayer of said bill for an injunction *pendente lite* as prayed for by the Complainant; and

The Complainant having this day filed in this cause the affidavit of W. B. Bevill, General Passenger Agent of the Complain-
333 ant, whereby it appears that he has caused to be prepared, subject to the approval and direction of the Court, tickets to be placed on sale at all stations in Virginia of the Norfolk and Western Railway Company, between Virginia stations, with coupons attached to be retained by the purchasers of said tickets, whereby it can be ascertained, at any time, in the future, the difference between the amount paid by such purchasers on or after the 1st day of July, 1907, for transportation over the railroad of the Norfolk and Western Railway Company at the regular fares for said transportation, and the amount that would have been paid for said transportation had the order of the State Corporation Commission of Virginia, entered on the 27th day of April, 1907, become effective on the 1st day of July, 1907; and whereby said purchasers may recover said difference between the regular fare as paid and the rate prescribed, in the event it shall be finally held in this proceeding that said order of the State Corporation Commission of Virginia was and is a valid and binding order upon the Complainant;

Now, therefore, to the end that the rights of no one shall be put in jeopardy pending this litigation, but that proper arrangements

shall be made and orders entered whereby the legal status of all parties affected by this litigation shall be preserved, it is now adjudged, ordered and decreed:

1st. That, in making sales of passenger transportation on the 1st day of July, 1907, and thereafter until further order of this Court, the Norfolk and Western Railway Company shall furnish to the purchasers of tickets or other evidences of transportation to be used between stations in Virginia, coupons or other evidences of the fact that the purchaser, in purchasing said transportation, has paid the regular fares or charges of said Railway Company between the points for which said transportation is purchased; and, in the event that said fares shall be paid in cash upon the trains of said
334 Railway Company, the Conductor of said train shall furnish a receipt to said passenger to the effect that the regular current fare has been paid by said passenger for intra-state Virginia transportation between the points mentioned in said receipt;

2nd. And, this Court having read the affidavit of W. B. Bevill, bearing date the 28th day of June, 1907, and having inspected the various forms of tickets, conductors' receipts and mileage books attached thereto, does now approve of said forms as being a substantial compliance, when used, with the order set forth in the foregoing paragraph;

And it is now further adjudged, ordered and decreed that said forms of tickets be and the same are hereby approved of in substance and, in the event that it shall be necessary, in the usual course of business of said Railway Company, to issue any other forms of tickets, said forms so issued shall contain substantially the provisions set forth in the forms of tickets filed with the affidavit of the said W. B. Bevill above referred to;

3rd. It is further adjudged, ordered and decreed that, if, for any reason, it shall be impossible for said complainant to strictly comply with the terms of this order in furnishing tickets with coupons as herein provided for at all of its stations by the 1st day of July, 1907, then the furnishing and putting of the same on sale at as early a date as may be practicable shall be deemed a substantial compliance with this order;

And it is further adjudged, ordered and decreed that the restraining order heretofore granted in this cause on the 15th day of May, 1907, is continued until the further order of this Court.

J. C. PRITCHARD,
U. S. Circuit Judge.

June 29th, 1907.

335 *Affidavit of B. G. Jones, Ticket Agent of Norfolk and Western Railway Company, on Behalf of Complainant.*

Filed July 1st, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

UNITED STATES OF AMERICA,
State of Virginia, City of Roanoke, To wit:

B. G. Jones, a witness of lawful age, being duly sworn, deposes and says as follows:

1. That he is, at the present time, engaged in the service of the Norfolk and Western Railway Company and has been an employé of said Company for the past eight or nine years; That for the past four or five years, he has been engaged as Ticket Agent for said Company at its passenger station at the City of Roanoke, Virginia, and, as such agent, he comes in daily and nightly contact with the practical business of selling one way excursion and mileage tickets and other evidences of transportation to the travelling public.

2. That the ticket office of the Norfolk and Western Railway Company at the City of Roanoke does a very considerable business and, as a matter of fact, the office for the sale of tickets is open practically the entire day and opportunity is afforded to the trav-
336 elling public for purchasing tickets at any time that may suit the individual convenience of the traveller; that, in spite of the fact that said office is open practically all the time, it is a fact observed and well known by this affiant that practically all of the ticket purchases made at said station are made within a period of time measured by a limit of fifteen or twenty minutes of the leaving time of the trains upon which said tickets are to be used, and most of said tickets are sold after said train has arrived at the Station and between that time and the time when said train is scheduled to leave, embracing a time of about fifteen minutes.

3. Affiant further states that, as a condition for appealing from the decision of the State Corporation Commission of Virginia requiring the Norfolk and Western Railway Company to fix a two cent maximum passenger rate as the standard rate upon its road, there is provided by the Constitution of Virginia that, pending the appeal said company is required "to keep such accounts and to make to the Commission, from time to time, such reports verified by oath as may, in the judgment of the commission, suffice to show the amounts being charged or received by the Company, pending the appeal, in excess of the charges allowed by the action of the commission appealed from, together with the names and addresses of the persons to whom such overcharges shall be refundable, in case the

charges made by the company, pending the appeal, be not sustained on such appeal."

Affiant states that the average number of tickets sold at the Roanoke station during each day is in excess of 500 tickets; and, in view of the fact above stated,—that almost the entire number of said tickets are purchased within the times above set forth relative to the arrival and departure of the trains at Roanoke, affiant states that it would be an actual impossibility for himself,
337 and any reasonable force of assistants that might be detailed to aid him in selling said tickets, to comply with the terms of said provision which is made a condition for said appeal.

Affiant says that, if the terms of said Constitutional Provision were required to be performed by him, it would involve either delays to all of the trains leaving the city of Roanoke, in order that the persons proposing to become passengers thereon could secure tickets with proper information recorded as to their names and addresses, or else large numbers of said passengers would have to board said trains without tickets, thus placing the duty of the collection of the company's revenue for transportation of said passengers upon the conductors in charge of said trains.

4. Affiant further says that he is acquainted generally with the conditions affecting the sale of tickets at the various stations on the Norfolk and Western Railway and knows the fact that, even at the smaller stations, the same custom prevails with the travelling public that obtains in the City of Roanoke, to the effect that said public are accustomed to purchase their tickets with a very short period of time prior to the schedule time for the arrival of the train upon which the passenger is proposing to travel; and affiant further states that, upon his belief as well as knowledge of the duties necessary to be performed by the agents of said smaller stations, in addition to the actual sale of tickets, the requirements placed upon said agents by the terms of said Constitution are requirements impossible to be performed within the period of time at the disposal of said agents for the sale of said tickets.

And further this deponent sayeth not:

B. G. JONES.

338 Subscribed and sworn to before me this 22nd day of June, 1907.

Given under my hand and notarial seal, this the 22nd day of June, 1907.

[NOTARIAL SEAL.] JULIAN H. RUTHERFORD,
Notary Public.

My commission expires Dec. 10, 1908.

Affidavit of Harry J. Douglass, Passenger Conductor of the Norfolk and Western Railway Company, on Behalf of Defendant.

Filed July 1st, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

UNITED STATES OF AMERICA.
State of Virginia, City of Roanoke, To-wit:

Harry J. Douglass, a witness of lawful age, being duly sworn, deposes and says as follows:

1. That he is at the present time engaged in the service of the Norfolk and Western Railway Company as one of its pas-
339 senger conductors and has been so engaged for the past fifteen (15) years; that he is well acquainted with all of the duties that have to be performed by passenger conductors incident to said position, the responsibilities pertaining to said position in respect to the travelling public and the obligations owing to the Railway Company.

2. Affiant further states that, as a condition for appealing from the decision of the State Corporation Commission of Virginia, requiring the Norfolk and Western Railway Company to fix a two cent maximum rate as the standard rate upon its road for the transportation of passengers, there is provided by the Constitution of Virginia, pending the appeal, that said Company is required "to keep such accounts and to make to the Commission, from time to time, such reports verified by oath as may, in the judgment of the commission, suffice to show the amounts being charged or received by the Company, pending the appeal, in excess of the charges allowed by the action of the commission appealed from, together with the names and addresses of the persons to whom such overcharges shall be refundable in case the charges made by the company pending the appeal be not sustained on such appeal."

Affiant states that, in view of the number of cash fares that are paid by passengers upon the trains of the Norfolk and Western Railway, which number is estimated by him as the result of his fifteen years' experience as a passenger conductor, he knows that it would be a physical impossibility for him to collect said fares and make a record of the names and addresses of the persons paying said fares; and that, if such a duty were imposed upon him, it would result in his inability to perform the duty imposed in the usual course of business and that, for the purpose of carrying out
340 said law, it would be necessary for him either to stop his trains between stations in order that said duty might be performed, or abandon the attempt to collect all of the revenue to which

the company would be entitled for the transportation of the passengers on said trains.

And further this deponent sayeth not.

H. J. DOUGLASS.

Subscribed and sworn to before me this the 22nd day of June, 1907.

Given under my hand and notarial seal this the 22nd day of June, 1907.

[NOTARIAL SEAL.] JULIAN H. RUTHERFORD,
Notary Public.

My commission expires Dec. 10, 1908.

311 *Special and Limited Appearance for Defendants.*

Filed July Rules, Monday, July 1st, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP, HENRY C. STUART, and JOSEPH E. WILLARD, Individually and as Constituting the State Corporation Commission of Virginia, and R. T. WILSON, Clerk of the State Corporation Commission of Virginia, Defendants.

Special and Limited Appearance at Rules for Defendants on the First Monday in the Month of July, 1907.

We, the undersigned attorneys-at-law, hereby appear for, and on behalf of, the defendants in the above named cause, for the purpose of objecting to the jurisdiction of this court to entertain the said cause, or to make any order therein, against the said defendants, or any of them, and for that purpose alone, this appearance is limited, and is made specially and solely for the purpose of objecting to the jurisdiction of the Court, in said cause, and for no other purpose whatsoever.

WILLIAM A. ANDERSON,
A. CAPERTON BRAXTON,
Solicitors and Counsel for said Defendants.

312 *Agreement of Counsel.*

Filed July 1st, 1907.

In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

It is agreed that, if the court should hold that it has jurisdiction of this cause, then it need not go into the question of the merits upon

the hearing of this rule, but may thereupon grant the preliminary injunction referred to in the rule and refer the cause to a Master; provided that the sole purpose and effect of this stipulation is and shall be that the granting of such preliminary injunction and the referring of the cause to a Master without further affidavits or testimony on the merits on the part of the Complainants shall not be assigned or treated as error; all other rights and remedies whatsoever of the defendants shall remain unaffected, and particularly shall they not be considered as or regarded as having made any concession upon the question of the jurisdiction of this court or the conclusiveness as a matter of law of the action or order of the Virginia State Corporation Commission in the premises, all questions on the merits being reserved for a hearing before the Master and before the Court on final hearing—the concession made herein by the defendants as to the granting of the interlocutory injunction is not to be used against them on any question of fact, or legal presumption as to fact, either before the Master or before the Court on the final hearing on the merits.

343 *Memorandum of the Court.*

Filed July 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

I fully appreciate the fact that the questions involved in this controversy are serious in their character and require the closest scrutiny in order that a proper conclusion may be reached in determining the same.

It is always a source of regret to me to be called upon to determine the validity of an Act of a legislative or other body representing a sovereign State, and in this instance, it is especially so, entertaining as I do, the profoundest respect for the State of Virginia and her institutions. This is also true of North Carolina, where I have been recently called upon to decide questions similar to those involved in this proceeding, and applies with equal force to any of the States of the Union. However, I am called upon to *pre*form a solemn duty and the obligation which rests upon me to determine the questions involved in this cause in accordance with the provisions of the Constitution of the United States is imperative. It is not my purpose to attribute any unworthy motives to those who framed the provisions of the constitution authorizing the creation of the Corpo-
344 ration Commission of Virginia. I am satisfied that those who were instrumental in securing the adoption of such provisions were honestly endeavoring to devise some means by which there could be a proper ascertainment of rates to be charged by railroads and other public corporations, yet in determining the questions pre-

sented for my consideration it becomes my duty to ascertain, if possible, the effect of the constitutional provisions in question. The courts cannot consider motives nor public policy in dealing with questions of this character, but must be guided solely in construing the same by the limitations imposed by the constitution of the United States. The power and duty of the courts of the United States to afford to individuals protection for their constitutional rights in respect to property even as against persons claiming under authority of the United States itself have repeatedly been recognized by the Supreme Court of the United States. A notable case being the one where the descendants of General Robert E. Lee instituted suit against officers of the United States for the possession of Arlington and the Circuit Court of the United States for the Eastern District of Virginia afforded relief to the constitutional rights of these descendants of General Lee for the possession of that property, and this decision of the Circuit Court was affirmed by the Supreme Court of the United States in the case of the United States *vs.* Lee 106 U. S. 196. The decision of the Circuit Court in this case is reported under the title of the Arlington case, 3rd Hughes 36.

The complainant in this cause seeks to enjoin the enforcement of certain passenger rates recently adopted by the State Corporation Commission of the State of Virginia. It insists that its present rates in the State of Virginia are not higher than a reasonable compensation for the services rendered by it to travellers on its lines, and are in no sense excessive or exorbitant; that they are not unjustly, unduly, unreasonable or illegally discriminatory between individuals, nor as between localities and that they in no way violate the law. It also insists that it has as an incident of its property, and as a property right, the right to charge for each service it renders a reasonable compensation, and that it is protected by the Fourteenth Amendment to the Constitution of the United States in making, receiving and collecting such charge. It is also insisted that the effect of the proposed rates would be to materially diminish its charges and reduce the same greatly below what would be reasonable and just compensation for the respective services rendered to the patrons of its lines. It is contended that to prevent it from charging a reasonable compensation for the services rendered to the travelling public would be to deprive it of its property without just compensation and without due process of law.

345

It is likewise insisted by the complainant that if the order of the State Corporation Commission of Virginia prescribing and fixing rates should be permitted to go into effect it would subject it to the danger of a multitude of suits based on such order and to prosecutions for penalties in enormous amounts.

Among other things complainant prays for an injunction against Beverley T. Crump, Henry C. Stuart, Joseph E. Willard, individually, and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of the State Corporation Commission during the pendency of this suit.

On May 15, 1907, an order was entered restraining the defendants from enforcing the provisions of the aforesaid Act, and at the same time, notice was issued to the defendants to appear before me on the

27th day of June 1907, and show cause why the injunction
346 should not be continued until the final hearing.

The defendants file an answer in which they say that the rates fixed by the State Corporation Commission are not confiscatory. However, when the motion came on for hearing counsel representing complainant and defendants signed an agreed statement of facts, as to that part of the bill which charges that the rates are confiscatory. The part of the agreement which is essential to the determination of the questions now before the court, reads as follows:

"It is agreed that, if the court should hold that it has jurisdiction of this cause, then it need not go into the question of the merits upon the hearing of this rule but may thereupon grant the preliminary injunction referred to in the rule and refer the cause to a master. * * *."

In view of the foregoing agreement the only question left for consideration is whether this court has jurisdiction of the questions involved.

It is insisted by counsel for the defendants that the State Corporation Commission of Virginia is a court within the meaning and intent of the provision of Section 720 of the Revised Statutes of the United States, which reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

I have heard with much pleasure the unusually able and interesting arguments of counsel representing complainant and defendants, and have given the questions presented much consideration, and in this connection, will say that, I have never had presented to me a question which has caused me greater concern than the one involved in this hearing.

Section 720 of the Revised Statutes is plain and explicit and cannot be misinterpreted, but I am forced to the conclusion that it does not apply in this instance.

It is true that the Court of Appeals of Virginia has held
347 that the Corporation Commission of Virginia possesses judicial, executive and legislative functions. Nevertheless I am of opinion that in fixing the rates involved in this controversy the Corporation Commission was exercising a legislative function, and therefore was not acting as a court within the meaning of Sec. 720 of the Revised Statutes, and its acts in attempting to put in force the rates thus established are administrative. Under these circumstances, this court has jurisdiction to restrain the defendants from publishing and enforcing the rates which have heretofore been prescribed and established by said Commission. The acts sought to be restrained being purely ministerial in their character, the complainant seeks to assert a right which is guaranteed by the Constitution of the United States and it thereby becomes the duty of the court to entertain jurisdiction in order that the reasonableness of such rates may be judicially determined.

It is not necessary, at this time, to pass upon the validity of the provision of the Constitution of Virginia which created the State

Corporation Commission; that is a question which the court reserves until the final hearing of this cause.

For the reasons herein stated the restraining order heretofore granted will be continued until the final hearing.

In conclusion, I will say that it is a source of gratification to me to know that my decision in respect to this question is not final, but that it is to be ultimately submitted to the Supreme Court of the United States for determination, and if I have committed error that distinguished tribunal will correct the same.

348 I will prepare an opinion at an early date in which I will discuss more fully my views in regard to the matters in controversy.

Decree Granting Interlocutory Injunction.

Entered and Filed July 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Before Honorable J. C. Pritchard, Judge of said Court.

In pursuance of the order to show cause made herein on the 15th day of May, 1907, by which the said defendants were ordered to appear before this Court in the United States Court Room at Asheville, N. C., at Ten o'clock a. m., on Thursday, the 27th day of June, 1907, to show cause if any they had or could show why an injunction *pendente lite* as prayed in the bill should not be issued, said defendants appeared by counsel and by consent of defendants through their counsel and of the complainant through its counsel the fourth paragraph of the order herein of May 15th, 1907, was amended so as to require the defendants and each of them to show cause before a Judge of this Court (instead of before this

349 Court) in the United States Court Room at Asheville, North Carolina, on the date mentioned;

And thereupon the defendants filed their answer in writing objecting to the jurisdiction of this Court in the premises and by a like consent Robert R. Prentis was substituted as one of the defendants in this cause in the place of the defendant Beverley T. Crump, said Robert R. Prentis having since the institution of this suit, succeeded the said Beverley T. Crump as a member and as Chairman of the State Corporation Commission of Virginia and it was stipulated at the bar of this court between counsel for the Complainant and counsel for the defendants as follows:

"It is agreed that, if the court should hold that it has jurisdiction of this cause, then it need not go into the question of the merits upon

the hearing of this rule, but may thereupon grant the preliminary injunction referred to in the rule, and refer the cause to a Master; provided that the sole purpose and effect of this stipulation is, and shall be, that the granting of such preliminary injunction, and the referring of the cause to a Master, without further affidavits or testimony on the merits on the part of the complainants shall not be assigned or treated as error; all other rights and remedies whatsoever of the defendants shall remain unaffected, and particularly shall they not be considered as, or regarded as, having made any concession upon the question of the jurisdiction of this court or the conclusiveness as a matter of law of the action or order of the Virginia State Corporation Commission in the premises, all questions on the merits being reserved for a hearing before the Master and before the Court on final hearing—the concession made herein by the defendants as to the granting of the interlocutory injunction is not — be used against them on any question of fact, or legal presumption as to fact, either before the Master or before the Court on the final hearing on the merits."

And thereupon the motion of the Complainant for an interlocutory injunction, as prayed in the bill, coming on to be heard before the judge of this court, and the said motion having been heard upon the bill of complaint in this cause, treated as an affidavit, upon the answer thereto of the defendants objecting to the jurisdiction of the court, upon said stipulation of counsel, and upon the affidavits filed herein by the complainant, and the said motion having
350 been argued by counsel, and having been fully considered, it is now ordered:

1. That, until the further order of the Court herein, the defendants Robert R. Prentis, Henry C. Stuart, and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and each and all of their successors in office, their and each of their servants, agents and employees, be, and they hereby are, restrained and enjoined from publishing, or having published, in any newspaper published in the City of Richmond, Virginia, the general order of the State Corporation Commission of Virginia, bearing date the 27th day of April, 1907, in respect to passenger rates, in the bill in this cause mentioned, and from taking any other step or steps whatsoever under the Constitution or laws of Virginia, or otherwise, to enforce the requirements of said order.

2. That, until the further order of the Court herein, the defendant, Richard T. Wilson, Clerk of the State Corporation Commission of Virginia, his successors in office, and his servants, agents and employees, be, and they hereby are, restrained and enjoined from publishing, or having published, said order of the State Corporation Commission of Virginia in any newspaper published in the City of Richmond.

3. That, until the further order of the Court herein, the owners, proprietors, or managers of any newspaper published in the city of Richmond, Virginia, be, and each and every one of them is, hereby restrained and enjoined from publishing, or having published, under the direction of the State Corporation Commission

of Virginia or the Clerk thereof, such order of the State Corporation Commission of Virginia.

4. That said complainant, or some one for it, shall before a judge of this Court, or the Clerk thereof, execute a bond in the penalty of Three Hundred & Seventy Five Thousand Dollars
351 with surety to be approved by such judge or by such clerk conditioned to pay into the registry of this court from time to time when and as the court may so order such sum or sums of money as shall be equal to the difference between the aggregate passenger rates charged and received by it for intrastate service on its lines in the State of Virginia and what would have been the aggregate amount for such service at the rates fixed in said order of the State Corporation Commission of Virginia of April 27th, 1907, and further conditioned that whereas an interlocutory injunction has been issued in this cause by the terms of which the defendants and each of them are restrained until the further order of this court, as from said order will appear, should the said interlocutory injunction be dissolved or vacated as having been wrongfully issued or because the said acts were improperly restrained, then that the complainant should pay or cause to be paid all damages caused by the issue of such interlocutory injunction and the costs in this cause in connection therewith.

5. That the Complainant shall give to any person purchasing a ticket for intrastate travel on its lines in the State of Virginia, and to any person purchasing a mileage book for travel on its lines in the State of Virginia and not good outside of said State, a transferable coupon or other written evidence representing the sum which such person or his transferee will upon the final decision of this cause upholding the validity of said order of April 27th, 1907 in respect to passenger rates be entitled to receive out of the cash deposit to be made in the registry of this court in pursuance of the obligation of the bond hereinbefore mentioned. The form of said coupon or of other written or printed evidence shall be sub-
352 stantially in the form attached to the tickets and other evidences of transportation heretofore filed in this cause with the affidavit of W. B. Bevill, General Passenger Agent of the complainant company which forms of tickets have heretofore been approved by an order entered on the 29th day of June 1907 by the Judge of this court. But nothing herein contained shall be construed as requiring the complainant to issue any such coupon or any such other written or printed evidence in connection with the sale of any mileage book or any ticket good for an interstate passage or for passage into another state or in other states.

6. That the complainant herein shall preserve and produce whenever so ordered by the court all cancelled tickets or other evidence of transportation in respect to which coupons as provided for in the order entered herein June 29th, 1907, may be outstanding, and shall, from time to time, as required by order of the Court so to do, report to the Court statements showing the revenue by it charged and collected for the intrastate transportation of passengers in the State of Virginia in excess of the amounts per-

mitted by said order of the State Corporation Commission of Virginia of April 27th, 1907, and the complainant shall from time to time give such further bond or bonds as the Court may require to secure proper payment into the registry of the Court of all the amounts which finally shall be adjudged that it should so pay under the final decision in this cause.

7. That, if it shall be determined herein that the complainant is entitled to the amounts covered by said bond or bonds then said bond or bonds shall be released and cancelled by the court and if any amount shall have been paid into the registry of the court pursuant to the orders of this court, that then upon such determination in favor of the complainant the sum or sums so paid into the
353 registry shall be repaid to the complainant without further order of the court herein.

8. That the restraining order heretofore entered in this cause shall be continued and remain in full force and effect until this interlocutory injunction shall take effect.

9. It is further ordered that a writ of injunction shall forthwith issue in accordance with this order.

10. And thereupon the complainant tendered its bond to comply with the provisions in respect to a bond in this order duly executed by the complainant as principal and by the United States Fidelity and Guaranty Company of Baltimore, Maryland as surety, which said bond and execution thereof and surety thereon are hereby approved.

July 10th, 1907.

J. C. PRITCHARD,
U. S. Circuit Judge.

354 *Injunction Bond.*

Filed July 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Know all men by these presents That the Norfolk and Western Railway Company, a corporation of the State of Virginia, whose principal office is in the City of Roanoke, in said State, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as Surety, are held and firmly bound unto the United States of America in the just and full sum of Three hundred and seventy-five thousand dollars, for the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves and each of our successors firmly by these presents. Sealed with our seals and dated this 10th day of July, 1907.

The condition of this obligation is such, that if the said Norfolk

and Western Railway Company shall pay into the registry of the Circuit Court of the United States for the Eastern District of Virginia, upon the order of said Court in the above mentioned cause, such sums as the Court may ascertain to be due to persons entitled to receive the difference between the amount paid by them for their intrastate travel in Virginia and the amount they would have had to pay under the order of the State Corporation Commission
355 of Virginia entered on the 27th day of April, 1907; and if the said Norfolk and Western Railway Company pay or cause to be paid all damages caused by the issue of the interlocutory injunction issued herein and the costs of this cause in connection therewith, then this obligation to be void, otherwise to remain in full force and effect.

[Seal of Norfolk and Western Railway Company.]

NORFOLK AND WESTERN RAILWAY COMPANY,
By WM. G. MACDOWELL, *First Vice President.*

Attest:
E. H. ALDEN, *Secretary.*

[Seal of United States Fidelity and Guaranty Company of Baltimore, Maryland.]

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND,
By E. LESLIE SPENCE, JR., *Attorney-in-Fact.*

356 *Interlocutory Injunction.*

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

The President of the United States of America, to Robert R. Prentis, Henry C. Stuart, Joseph E. Willard and Richard T. Wilson, Greeting:

The Honorable Judge of the Circuit Court of the United States for the Eastern District of Virginia, having on the 10th day of July, 1907, after due notice and hearing, ordered that an injunction issue as herein stated, to-wit:

1. That until the further order of the Court herein the defendants, Robert R. Prentis, Henry C. Stuart, and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia and each and all of their successors in office, their and each of their servants, agents and employees be and they are hereby restrained and enjoined from publishing or having published in

any newspaper published in the City of Richmond, Virginia, the general order of the State Corporation Commission of Virginia, bearing date the 27th day of April, 1907, in respect to passenger rates in the bill in this cause mentioned and from taking any other step or steps whatsoever under the Constitution or laws of Virginia
357 or otherwise to enforce the requirements of said order.

2. That until the further order of the Court herein, the defendant Richard T. Wilson, Clerk of the State Corporation Commission of Virginia, his successors in office and his servants, agents and employees be and they hereby are restrained and enjoined from publishing or having published said order of the State Corporation Commission of Virginia in any newspaper published in the City of Richmond.

3. That until the further order of the Court herein the owners, proprietors or managers of any newspaper published in the City of Richmond, Virginia, be and each and every one of them is hereby restrained and enjoined from publishing or having published under the direction of the State Corporation Commission of Virginia, or the Clerk thereof such order of the State Corporation Commission of Virginia.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of Richmond, in the State of Virginia, this 10th day of July, A. D., 1907.

[Seal of United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Marshal's Return.

Executed July 11th, 1907, by delivering in person to Robert R. Prentis, Joseph E. Willard and R. T. Wilson at the office of the State Corporation Commission of Virginia in Richmond, Va., each a true copy of the within order, and further executed on the 13th day of July, 1907, by delivering in person to Henry C. Stuart at the office of the State Corporation Commission of Virginia in Richmond, Va., a true copy of the within order.

MORGAN TREAT,
United States Marshal.

358 *Demurrer of Robert R. Prentis to Bill of Complaint.*

Filed August Rules, Monday, August 5th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

The demurrer of Robert R. Prentis, one of the defendants to the above styled suit, to the bill of complaint of the above named complainant.

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows:

First. That the said plaintiff has not, in and by the said bill, made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for;

Second. That this defendant has no personal or individual
359 interest in the matters and things referred to in said bill;

Third. That the said plaintiff has an adequate remedy at law;

Fourth. That the matters and things complained of in said bill are *res adjudicata;*

Fifth. That this court has no jurisdiction to hear and determine this cause, for the reason that this is a suit against the State of Virginia;

Sixth. That this court has no jurisdiction to hear and determine this cause, for the reason that the State Corporation Commission is a "court" of the State of Virginia, and this court is therefore without power to enjoin the said Commission;

Seventh. That this court has no jurisdiction to hear and determine this cause, for the reason that, if said Commission is not such a "court" as this court is without power to enjoin, then the publication of said Commission's order of April 27th, 1907, was a necessary part of the enactment of the same as legislation, and this court is equally without power to enjoin legislation before it is enacted.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto, and humbly demands the judgment of this court whether he shall be compelled to
360 make any further answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

WILLIAM A. ANDERSON,
A. CAPERTON BRAXTON,
JNO. W. DANIEL.
Counsel for said Defendants.

We hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law.

WILLIAM A. ANDERSON,
A. CAPERTON BRAXTON,
JNO. W. DANIEL,
Counsel for said Defendants.

STATE OF VIRGINIA, *City of Richmond, To-wit :*

Robert R. Prentis, being first duly sworn, deposes and says, that he is the defendant named in the foregoing demurrer; that said demurrer is not interposed for delay, and that the same is true in point of fact.

ROBERT R. PRENTIS.

Subscribed and sworn to before me this 3rd day of August, 1907.

JNO. S. EGGLESTON,
Notary Public for the City of Richmond, in the State of Virginia.

361 *Joint and Separate Plea of H. C. Stuart, Joseph E. Willard, and R. T. Wilson to Bill of Complaint.*

Filed August Rules, Monday, August 5th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

The joint and separate plea of H. C. Stuart, Joseph E. Willard, and R. T. Wilson, three of the defendants to the above styled suit, to the bill of complaint of the above named complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, for plea to the whole of said bill, say that they have no personal, private, or individual connection with the subject matter of this suit, but are only interested therein, or connected therewith in so far as the said Stuart and Willard are two of the three members of the State Corporation Commission of Virginia and said Wilson is Clerk thereof; that the said State Corporation Commission was created and established, and its functions, powers, duties, and
362 procedure prescribed and provided for, by the Constitution and statutes of said State (of which this court will take judicial notice) as will fully appear from "Defendants' Exhibit A," "Defendants' Exhibit B," "Defendants' Exhibit No. 1," and "De-

fendants' Exhibit No. 2," all of which said exhibits are filed with, and made a part of the Answer of the defendants herein to the Rule heretofore awarded in this cause, requiring said defendants to appear before the Honorable Jeter C. Pritchard, one of the Judges of this Court, at the City of Asheville, in the State of North Carolina, on the 27th day of June, 1907, and show cause why an injunction *pendente lite* should not issue, as prayed for in said bill of complaint, and which said exhibits are hereby referred to, and made a part of this plea as fully as if the same were herein set forth *in extenso,* and are prayed to be taken and read as a part of this plea; that the said constitutional and statutory provisions are still in full force and effect, and have been in full force and effect continuously since prior to the 1st day of January, 1904, and they represent the entire constitutional and statutory provisions of said State upon the subject of this plea or relating to the subject-matter of this suit, in effect at any time since the 1st day of January, 1904; that, on the 6th day of October, 1903, certain Rules of Order, Practice and Procedure before the said State Corporation Commission were duly made and prescribed by said Commission and entered upon the records of its proceedings, and also printed and distributed, all of which was authorized by the aforesaid statutes, and was in accordance with the authority and provisions of said statutes; which said Rules of Order, Practice and Procedure are filed as "Defendants' Exhibit
363 No. 3" with, and made a part of, the aforesaid Answer of the defendants herein to the aforesaid Rule to show cause why an injunction *pendente lite* should not be awarded in this suit, as prayed for in said bill of complaint, and which said Exhibit is hereby referred to, and made a part of this plea as fully as if the same was herein set forth *in extenso,* and is prayed to be taken and read as a part of this plea; that the proceedings before the said State Corporation Commission, which are referred to in said bill of complaint, and in which the said Commission, on the 27th day of April, 1907, entered its order in respect to the passenger rates of the plaintiff, complained of in said bill of complaint, were taken and had before the said Commission in strict conformity, in every respect, with the provisions, hereinbefore referred to, of the Constitution and statutes of the said State, and of the said Rules of Order, Practice and Procedure, all of which will more fully and at large appear from sections "*Fifth*" and "*Eighth*" of the aforesaid Answer of the defendants herein to the aforesaid Rule to show cause why an injunction *pendente lite* should not be awarded in this suit, as prayed for in said bill of complaint, and from "Defendants' Exhibit No. 4" and "Defendants' Exhibit No. 5," which said Exhibits are filed with and made a part of the said Answer of the defendants herein to the aforesaid Rule, and which said Exhibits, and sections "*Fifth*" and "*Eighth*" of the said Answer to said Rule, (except in so far as said sections present any defense other than the sole defense interposed by and relied upon in this plea, viz: that this suit cannot be entertained by this court because of the inhibition of Sec. 720 of the Revised Statutes of the United States, hereinafter more par-

ticularly referred to,) are hereby referred to, and made
364 a part of this plea as fully as if the same were herein set forth *in extenso*, and are prayed to be taken and read as a part of this Plea; that the Commonwealth of Virginia was a formal plaintiff in the aforesaid proceedings before said Commission, referred to in said bill of complaint, and was required to be such, by the aforesaid laws of said State; that, under said laws, the said Commonwealth, as well as any defendant in said proceedings, may, as a matter of right, now appeal from said order of said Commission, of April 27th, 1907, to the Supreme Court of Appeals of Virginia; that, for the reasons next hereinafter pointed out, this honorable court is without power to enjoin the said Supreme Court of Appeals from hearing and deciding any such appeal, should the same be taken; that, by a certain Act of the Congress of the United States, which is printed and published as Section 720 of the Revised Statutes of the United States, it is provided that, "a writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy"; that no injunction is, or ever has been, authorized to be granted in this suit "by any law relating to proceedings in bankruptcy"; that, as will appear from the aforesaid constitutional and statutory provisions of the said State, and also from the decisions and opinions of the Supreme Court of Appeals of said State, which is the highest court of, and the court of last resort in, the said State, of which said opinions and decisions, as well as of which said constitutional and statutory provisions, this court will take judicial notice, the
365 said State Corporation Commission of Virginia is a "court" of the said State, within the true meaning, purport, intent, and purview of the aforesaid Act of Congress, and was acting as such "court" continuously from the inception of the aforesaid proceedings before it, referred to in said bill of complaint, up to and including the entry of its aforesaid order of April 27th, 1907, relating to the passenger rates of the plaintiff, and was also so acting in publishing said order, in accordance with the aforesaid laws of the said State, and was also so acting at the time this suit was instituted, and at the time the restraining order was granted in this suit, and will and must so act in any and all steps which it may hereafter take in respect to matters and things referred to in said bill of complaint; and these defendants say that this honorable court is without power to grant any of the relief prayed for in the said bill of complaint, or to entertain this suit, because no relief can be granted the plaintiff herein without enjoining said State Corporation Commission, which this court is forbidden to do by the aforesaid Act of Congress; all of which matters and things these defendants aver to be true, and they plead the same to the whole of the said plaintiff's bill, as aforesaid, and pray the judgment of this honorable court whether they ought to be required to make any other or further answer to the said bill, and pray to be hence dismissed,

with their costs and charges in that behalf most wrongfully sustained.

JNO. W. DANIEL,
WILLIAM A. ANDERSON,
A. C. BRAXTON,
Counsel for said Defendants.

366 We hereby certify that, in our opinion, the foregoing plea is well founded in point of law.

JNO. W. DANIEL,
WILLIAM A. ANDERSON,
A. C. BRAXTON,
Counsel for Defendants.

STATE OF VIRGINIA, *City of Richmond, To wit:*

H. C. Stuart, being duly sworn, deposes and says that he is one of the defendants named in the foregoing plea, and that the said plea is true in point of fact, and is not interposed for delay.

H. C. STUART.

Subscribed and sworn to before me, this 5th day of August, 1907.

JNO. S. EGGLESTON,
Notary Public for the City of Richmond,
In the State of Virginia.

Petition for Modification of Interlocutory Injunction.

Filed August 29th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

367 To the Honorable Judges of the United States Circuit Court for the Eastern District of Virginia:

Complainant, the Norfolk and Western Railway Company, respectfully represents:

1. That, heretofore, it has filed before the Honorable Judges of the Circuit Court of the United States for the Eastern District of Virginia, its bill in equity against Beverley T. Crump, Henry C. Stuart and Joseph E. Willard, members of the State Corporation Commission of Virginia, and Richard T. Wilson, Clerk of the said Commission, in which bill it was prayed, for reasons therein fully and at large set forth, that a certain order, entered by the State Corporation Commission of Virginia on the 27th day of April, 1907,

whereby a two cent per mile maximum passenger rate was imposed upon the complainant as the maximum charge it could make for carrying passengers upon its railroad in the State of Virginia, should be declared unreasonable, inoperative and void.

2. Complainant further says that, in response to the prayer of the said bill, the Honorable J. C. Pritchard, one of the judges of this Honorable Court, did on the 15th day of May, 1907, enter a restraining order against the publication and promulgation of said two cent per mile maximum passenger rate and, at the same time, caused a rule to be issued against said defendants to show cause, if any they could show, why said restraining order should not be continued and an injunction, *pendente lite*, granted in accordance with the prayer of this complainant, which said rule was made returnable at the City of Asheville, N. C., on the 27th day of June, 1907.

3. Complainant further shows that, thereafter, on the said 27th day of June, 1907, the defendants appeared at the City of
368 Asheville, N. C., in response to said rule, and filed their answer to the same, in which said answer the defendants maintained, upon the various grounds therein set up, that this Court was without jurisdiction to enter any order in the premises save an order dismissing the said proceedings for want of jurisdiction.

4. Complainant, however, says that, after full argument of and concerning all the matters of jurisdiction set forth in said answer, The Honorable J. C. Pritchard decided that the United States Circuit Court for the Eastern District of Virginia did have, and of right should maintain, jurisdiction of and concerning the matters and things complained of in said bill; and, in pursuance of said judgment and conclusion, an order was entered by him on the 10th day of July, 1907, granting to complainant an injunction, *pendente lite*, against the doing of the things complained of in said bill.

5. Complainant further says that, since said injunction, *pendente lite*, has been granted by this Honorable Court, conferences have been held with the representatives of the State of Virginia looking to a friendly arrangement pending the final determination of the issues set up in said bill whereby this complainant shall put into effect a two cent passenger rate in conducting its intra-state Virginia business, the same to remain in effect until said issues have been finally determined; and that these conferences reached a final conclusion as is evidenced by the following letters which have been exchanged between the Honorable Claude A. Swanson, the Governor of Virginia, and this complainant and other railway companies which have suits pending in this Court similar in character to the one instituted by complainant:

369 "COMMONWEALTH OF VIRGINIA, GOVERNOR'S OFFICE,
RICHMOND, *August* 3, 1907.

Hon. Alexander Hamilton, Counsel for Atlantic Coast Line Railroad Company; Hon. Henry T. Wickham, Counsel for the Chesapeake and Ohio Railway Company; Messrs. Joseph I. Doran and Lucien H. Cocke, Counsel for Norfolk & Western Railway Company; Hon. Alfred P. Thom, Counsel for Southern Railway Company.

MY DEAR SIRS: As Governor of Virginia, and as such interested in all that appertains to the best interests of the State, I have been very much concerned in the pending suits and controversies affecting the establishment of passenger rates in the State of Virginia. The welfare of all would, in my opinion, be subserved by a satisfactory and amicable arrangement pending the litigation.

I realize that the material interests of Virginia and the wellbeing of her people are largely dependent upon the development and efficiency of her transportation lines.

The railroad companies and their interests are entitled to the same rights and the same consideration that other persons and their property are entitled to; no more and no less. The people of Virginia, as I am confident, concur with me in thinking that these companies are entitled to be given no special privileges and that they should not be subjected to any unjust burdens and discriminations.

Feeling this, and as Governor of Virginia interested in all of her varied interests, it is my earnest hope that this controversy may reach such a prompt and satisfactory solution as will be beneficial to all parties.

I have cordially co-operated with the Corporation Commission and their counsel in this matter, and am frank to say am in thorough accord with the Commission with respect to their authority and their action in the rate cases.

With the approval of the Corporation Commission I tender the following proposal for your consideration, and regard it as a fair arrangement pending the final adjudication of the controversy by the Supreme Court of the United States.

1. The passenger rates, rules and regulations with respect thereto, ordered by the Corporation Commission on April 27th, 1907, shall be put into operation not later than the first of October, 1907, and continued until the pending cases are finally adjudicated by the Supreme Court of the United States, both as to jurisdiction, and merits.

2. That the cases in the Circuit Court of the United States shall be hastened for decision in the Supreme Court of the United States as speedily as possible.

3. That the evidence that has already been introduced in the cases before the Corporation Commission shall be used as the evidence in the litigation in the Circuit Court of the United States if and
370 when heard on its merits, each party having the right to supplement it with additional evidence as to facts subsequently arising.

4. That counsel representing the State and counsel representing

the railroads shall agree upon a method of procedure and proper details necessary to carry these suggestions into effect, and to more accurately and carefully define and protect the rights of the parties.

I feel sure the acceptance of these suggestions would be regarded by the people of Virginia as an evidence of a disposition on the part of the railroads to have a speedy determination of this question, and to respect the wishes and judgment of the people of Virginia, and her constituted authorities in this matter.

Very respectfully yours,

(Signed) CLAUDE A. SWANSON, *Governor.*"

"RICHMOND, VA., *August 3rd*, 1907.

To the Honorable Claude A. Swanson, Governor of Virginia.

DEAR SIR: We beg to acknowledge your letter of this date bearing upon a proposed adjustment, *pendente lite*, of the controversy over the passenger rates adopted by the State Corporation Commission of Virginia.

The spirit of your letter is appreciated by us and in a similar spirit we accept your suggestions, subject, however, as to your first suggestion, to the necessity for us first to obtain the approval of the Circuit Court of the United States for the Eastern District of Virginia to a modification of the interlocutory injunction awarded it in our several cases. We will, however, make early application for such modification and, as these injunctions were granted on our motion, we anticipate no difficulty in having the rates in effect by the first of October as mentioned by you.

We note and have acted upon what you say in respect to an arrangement as to the method of procedure and as to the details of carrying this adjustment into effect.

Yours respectfully,

ALEXANDER HAMILTON.
H. T. WICKHAM.
JOS. I. DORAN.
(Signed) LUCIAN H. COCKE.
By JOS. I. DORAN.
ALFRED P. THOM."

And now, Complainant, in pursuance of the understanding reached at said conference as evidenced by the letters hereinabove set forth, prays this Honorable Court that an order may be entered whereby Complainant may be authorized to put into effect on the 1st day of October, 1907, in its intra-state passenger service
371 in the State of Virginia, a maximum passenger rate of two cents per mile, the same to remain in effect pending the suit in which this petition is filed and until all of the issues set up in these proceedings shall have been finally passed upon by the Supreme Court of the United States, or shall, in some other way, have been finally disposed of;

And your petitioner will ever pray, etc., etc.

NORFOLK AND WESTERN RAILWAY COMPANY,
By L. E. JOHNSON, *President.*

STATE OF VIRGINIA, *City of Roanoke, To wit:*

I, Julian H. Rutherfoord, a Notary Public in and for the City and State aforesaid, do certify that this day personally appeared before me, in my City aforesaid, L. E. Johnson, President of the Norfolk and Western Railway Company, and being by me duly sworn deposes and says that the statements made in the foregoing petition are true and correct.

L. E. JOHNSON.

Subscribed and sworn to before me this 26th day of August, 1907.
[NOTARIAL SEAL.] JULIAN H. RUTHERFOORD,
Notary Public.

No tax.
My Commission expires, December 10th, 1908.

372 *Decree Modifying Interlocutory Injunction.*

Entered and Filed August 29th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

This cause came on this the 29th day of Aug., 1907, to be heard upon the bill of complaint of the Complainant with the exhibits therewith filed, upon the restraining order heretofore granted in response to the prayer of said bill, upon the injunction *pendente lite* heretofore granted on the 10th day of July, 1907, and upon the petition of the complainant, which is, by leave of the Court, this day filed.

And it appearing to the Court upon the reading of said petition and for the reasons therein set forth that it is the desire of said Complainant to put into effect in the State of Virginia for its intrastate passenger business a maximum rate of 2 cents per mile, which rate shall be effective on the 1st day of October, 1907, and shall continue in effect until the matters at issue in this case shall be finally disposed of by the decision of the Supreme Court of the United States or otherwise finally determined.

373 Now this Court having considered the entire record, including said petition this day filed, doth adjudge, order and decree that the prayer of the said petition be and the same is hereby granted and to this end the injunction *pendente lite* heretofore granted in this cause on the 10th day of July, 1907, be and the same is now amended and modified to the end that authority is hereby given to the complainant to put into effect on the 1st day of October, 1907, a maximum passenger rate for its intrastate passenger

business in the State of Virginia of 2 cents per mile, the same to obtain and be in effect until the issues in this cause shall have been finally passed upon and determined by the Supreme Court of the United States or otherwise finally disposed of and ended.

And by consent of all parties to this suit it is further adjudged, ordered and decreed that, in so putting into effect the said maximum passenger rate where, in the putting in of such rate, either the whole number of miles or mixed number with fractions does not result in a multiple of 5 the said complainant shall add or deduct a sufficient sum to make the amount of the fare the nearest multiple of 5; and also that in applying the said passenger rate the said complainant may charge and collect a minimum sum of 10 cents per passenger for any single haul and said complainant may charge and collect in addition to regular ticket rates the fixed sum of 10 cents from all cash fare passengers who had been afforded reasonable opportunity for purchasing tickets before boarding the train, provided that the conductor shall in all such cases deliver to such passengers a receipt for the excess collected and said complainant shall redeem said receipt if presented to any of its ticket offices within thirty days from the date of its issue;

374 And by like consent it is further adjudged, ordered and decreed that the Complainant shall carry free for said passengers paying the rate of fare as herein provided the same amount of baggage as it has been heretofore accustomed to do under its rules and regulations and for excess baggage it shall make the same charges that it has been accustomed to make without increasing the same or changing the regulations in connection therewith unless authorized by a further order of this Court.

J. C. PRITCHARD,
U. S. Circuit Judge.

Aug. 29th, 1907.

Setting Down Demurrer of R. R. Prentis to be Argued.

Filed September Rules, Monday, September 2nd, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Now comes the Complainant, the Norfolk and Western Railway Company, by its Counsel in the above entitled cause and sets down the demurrer filed by Robert R. Prentis, one of the defendants herein, to be argued.

JOS. I. DORAN,
LUCIAN H. COCKE,
Counsel for Complainant.

375 *Setting Down Joint and Separate Plea of Henry C. Stuart, Joseph E. Willard and R. T. Wilson to be Argued.*

Filed September Rules, Monday, September 2nd, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Now comes the Complainant, the Norfolk & Western Railway Company, by its Counsel in the above entitled cause and sets down the plea filed by Henry C. Stuart, Joseph E. Willard and R. T. Wilson, defendants herein, to be argued, on the ground that the said plea does not furnish any sufficient defense to the bill of complaint herein filed.

JOS. I. DORAN,
LUCIAN H. COCKE,
Counsel for Complainant.

376 *Order Filing Plea of Res Adjudicata.*

Entered and Filed September 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

The Defendants by Counsel tendered to the Court a plea of *res adjudicata* to the Complainant's bill in this cause, and moved the Court to grant them leave to file said plea, whereupon it is ordered that said leave be given and the plea is accordingly filed.

And it is further ordered that leave be, and the same is hereby granted to the Complainant in this cause to set down the said plea to be argued, or take issue on said plea on or before the first day of the October Term 1907 of this Court.

J. C. PRITCHARD,
United States Circuit Judge.

September 10th, 1907.

377 *Plea of Res Adjudicata.*

Filed September 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,

versus

ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump), H. C. STUART and JOSEPH E. WILLARD, Individually and as Constituting the State Corporation Commission of Virginia, and R. T. WILSON, Clerk of said Commission, Defendants.

The Joint and Several Plea of the Above Named Defendants to the Bill of Complaint of the Above Named Complainant.

These defendants respectively by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill to be true in such manner and form as the same are therein set forth and alleged, for further plea to the whole of said bill, say as follows:

That at a lawful session of the Virginia State Corporation Commission held on the 27th day of April, 1907, in the rooms of said Commission in the State Capitol in the City of Richmond, Virginia, said Commission entered up the final order and judgment and made its final findings in the case then pending before said Commission known as The Virginia Passenger Rate Case, in which case the Commonwealth of Virginia was the plaintiff, and the said complainant here, and others were the defendants, which order and judgment and findings of said Commission were made pursuant to a certain notice to the complainant here, and the other steam railway companies operating lines of steam railway in the State of
378 Virginia, the defendants in said Passenger Rate Case, which notice, proceedings, and findings are set forth *in extenso* in Defendants' Exhibit No. 5, exhibited as a part of the Answer of these defendants, to the Rule heretofore awarded in this cause requiring these defendants and each of them to show cause before this Court or the Judge thereof in the United States Court Room at Asheville, North Carolina, at 10 o'clock on the 27th day of June, 1907, why an injunction *pendente lite* as prayed for in the said Bill should not be issued, to which exhibit now a part of the record in this cause, special reference is here made.

And these defendants aver that the said the State Corporation Commission of the State of Virginia which entered said order and judgment, and made said findings as set forth in said Exhibit No. 5, filed as part of said Answer, was at and before the said 27th of April, 1907, and has continued from said last mentioned date to be, and still is, and continues to be, a tribunal validly created and constituted under the Constitution and laws of said Commonwealth, and thereby duly invested and clothed with exclusive original juris-

diction and power in the matter of regulating and prescribing the charges which shall be made by the complainant and all other companies or corporations owning or operating railways in said State, for the transportation of passengers between points wholly within the territorial limits of Virginia, upon the lines of railway so owned or operated by any such company; and said Commission was, and is, and continues to be, at the date of, before, and since the said 27th of April, 1907, fully empowered by said Constitution and laws to control and regulate all such companies in respect to their duties to the public within the Commonwealth of Virginia, under and by virtue of the statutes, and sections of the Constitution of Virginia heretofore filed as part of the said Answer to said Rule as
379 Defendants' Exhibit No. 1, Defendants' Exhibit No. 2, and already made a part of the record in this cause.

And these defendants say further that the said State Corporation Commission, as it was required by law that it should do, accorded to the complainant here, one of the defendants in said Passenger Rate Case, a full and complete hearing, all proper judicial process, and all due process of law, and every opportunity to make every defense, and to assert every right which said complainant might desire, or be advised to assert in said case against the proposed reduction of the rates and fares theretofore charged by the complainant for the transportation of passengers on its lines within the State of Virginia.

And these defendants further say that the complainant here was duly made a party defendant in and to said Passenger Rate Case, appeared before said tribunal therein upon the hearing and trial thereof by counsel, filed its Answer therein, introduced all of the testimony which it desired, or was advised to be necessary or proper for making its defense therein, both of witnesses heard and examined orally before said Commission, and of documentary and other written testimony filed before said Commission as part of the case of the said defendant, who is now the complainant here.

And these defendants further say that said tribunal (then consisting of Beverley T. Crump, said H. C. Stuart, and Joseph E. Willard), as it was its duty to do, proceeded and acted in all respects judicially in the hearing of said case, and in all of the proceedings had in connection therewith, and judicially investigated and considered all the questions and matters passed upon by said Commission in said case, or which were pertinent to the questions and matters presented therein, and in making its findings, and entering its order, and judgments aforesaid, as will appear from the
380 Exhibits filed as part of their aforesaid Answer to said Rule.

And these defendants further say that the same identical matters, and every matter, and every question which is presented or raised by the Bill of Complaint here, and every ground of complaint or of defense against the proposed action of said Commission, which the complainant seeks to assert here against the justness and reasonableness or the legality of the rates adjudicated, fixed, and prescribed in said case by said State tribunal for the transportation of passengers by the complainant upon its lines in Virginia, was

presented, involved, raised, heard, tried, and passed upon, adjudicated, and finally decided by said State Corporation Commission of Virginia in due and legal manner and form in said Virginia Passenger Rate Case, in which the said Commonwealth was the plaintiff, and the complainant here was a defendant, and that said State Corporation Commission thereupon rendered and entered up its aforesaid final decision, order, and judgment upon the merits, upon the very same identical matters now sued upon in this cause.

Wherefore these defendants now here specially plead and rely upon said former judgment, in bar to the said plaintiff's present Bill, and humbly demand the judgment of this Honorable Court whether they shall be required to make any further defense thereto, and respectfully pray to be hence dismissed with their costs and charges in this behalf sustained.

WILLIAM A. ANDERSON,
JNO. W. DANIEL,
A. CAPERTON BRAXTON,
Of Counsel for Defendants.

381 I hereby certify that in my opinion the foregoing plea is well founded in law.

WILLIAM A. ANDERSON,
Of Counsel for Defendants.

STATE OF VIRGINIA, *City of Richmond, To-wit:*

R. T. Wilson, being duly sworn deposes and says that he is one of the above named defendants, and that the foregoing plea is true in point of fact, and is not interposed for delay.

R. T. WILSON.

Subscribed and sworn to before me in my City aforesaid this the 10th day of September, 1903.

T. GRAY HADDON,
Notary Public in and for Richmond City.

382 *Setting Down Plea of Res Adjudicata to be Argued.*

Filed October Rules, Monday, October 7th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Now comes the complainant, Norfolk and Western Railway Company, by its counsel, in the above entitled suit, and sets down the Joint and Several Plea of *Res Adjudicata* filed by the above named

defendants, by leave of Court, on the 10th day of September, 1907, to be argued on the ground that the said Plea does not furnish any sufficient defense to the Bill of Complaint herein filed.

JOSEPH I. DORAN,
JULIAN H. COCKE,
Counsel for Complainant.

383 *Final Decree.*

Entered and Filed December 26th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant.
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

This cause came on this 26th day of December, 1907, to be heard upon the Bill of Complaint, with the exhibits therewith filed, and upon the papers formerly filed herein, including the special and limited appearance of the defendants at Rules, and their joint and separate answer to the Rule herein, returnable on June 27, 1907, and upon the proceedings and orders heretofore had and entered in this cause, and upon the demurrer of Robert R. Prentis (substituted defendant for Beverley T. Crump), which has been duly set down to be argued, and upon the joint and separate plea of Henry C. Stuart, Joseph E. Willard and R. T. Wilson, three of the defendants in the above styled suit, filed in this cause on the 5th day of August, 1907, which said plea has also been duly set down to be argued, and upon the joint and several plea of *res adjudicata* filed by leave of court on the 10th day of September, 1907, in this cause by Robert R. Prentis (substituted defendant for Beverley T. Crump),

384 Henry C. Stuart, and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of said Commission, which said plea of *res adjudicata* has also been duly set down to be argued.

And this cause having been fully argued by counsel, and the court, having fully considered the record herein and the argument of counsel, and, being of the opinion that the demurrer of said defendant Robert R. Prentis is not well founded in law, it is now adjudged, ordered and decreed that the said demurrer be, and the same is, hereby over-ruled;

And the court, being further of the opinion that the joint and separate plea of the said Henry C. Stuart, Joseph E. Willard and R. T. Wilson, set down to be argued as aforesaid, is also not sufficient in law, the court doth now further adjudge, order and decree that the said plea be and the same is hereby over-ruled as not being good in law;

And the court being further of the opinion that the joint and several plea of *res adjudicata* of Robert R. Prentis (substituted defendant for Beverley T. Crump), Henry C. Stuart and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of said Commission, set down to be argued as aforesaid, is also not sufficient in law, the court doth now further adjudge, order and decree that the said plea of *res adjudicata* be and the same is hereby over-ruled as being not good in law;

And the said Robert R. Prentis standing upon his demurrer, and the said Henry C. Stuart, Joseph E. Willard and R. T. Wilson standing upon the said joint and separate plea filed in this cause on the 5th day of August, 1907, and the said Robert R.
385 Prentis (substituted defendant in the place of Beverley T. Crump) Henry C. Stuart and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of said State Corporation Commission of Virginia, standing upon said plea of *res adjudicata* filed in this cause on the 10th day of September, 1907, and upon the joint and separate Answer of the defendants to said Rule returnable on June 27th, 1907, and each and all of them declining to answer the bill, it is now, upon consideration thereof, finally adjudged, ordered and decreed that the Bill of Complaint in this cause be, and the same is, hereby sustained and taken for confessed;

And this court, being of opinion that the order of the State Corporation Commission of Virginia of the 27th day of April, 1907, complained of in the Bill, violates the rights of the Complainant under the Constitution of the United States, and is in contravention thereof, as alleged in the bill, and that accordingly the Complainant is entitled to the relief prayed for in said Bill, as set forth therein, doth so adjudge, order and decree, and doth further adjudge, order and decree that the interlocutory injunction awarded in this cause on the 10th day of July 1907, be, and the same is, hereby made perpetual, and accordingly:

1. That the defendants, Robert R. Prentis, Henry C. Stuart, and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and each and all of their successors in office, each and every of their servants, agents and employees, be, and they hereby are, perpetually restrained and enjoined from publishing, or having published, in any newspaper published in the City of Richmond, Virginia, as against the Complainant herein, the general order of the State Corporation Commission of Virginia bearing date the 27th day of April 1907, in respect to passenger rates, in the bill in this cause mentioned, and from taking any
386 other step or steps whatsoever under the constitution or laws of the State of Virginia, or otherwise, to enforce against the said Complainant the requirements of said order.

2. That the defendant Richard T. Wilson, Clerk of the State Corporation Commission of Virginia, his successors in office, and his servants, agents and employés, be, and they hereby are, perpetually restrained and enjoined from publishing, or having published, as

against said Complainant herein, said order of the State Corporation Commission of Virginia in any newspaper published in the City of Richmond, Virginia.

3. That the owners, proprietors and managers of any and all newspapers published in the City of Richmond, Virginia, and the agents of any such owners, proprietors or managers of any such newspapers published in the City of Richmond, Virginia, be, and they and each and every one of them are, hereby perpetually enjoined and restrained from publishing or having published, as against the Complainant herein, under the direction of the State Corporation Commission of Virginia, or of the Clerk thereof, said general order of said State Corporation Commission of Virginia, entered on the 27th day of April, 1907.

4. That the bonds heretofore given by the complainant in this cause, be, and the same hereby are, released and canceled, and the Complainant and the sureties thereon are hereby released and discharged from any and all liability in respect thereto.

5. That a writ of injunction issue out of this Court, and under the seal thereof, directed to the said defendants, commanding, enjoining and restraining them, as hereinbefore set forth, which injunction shall be perpetual, save as is hereinafter provided.

387 But it is further adjudged, ordered and decreed that the defendants, members of, and the clerk to, the said Corporation Commission of Virginia, respectively, as set forth in these proceedings, may hereafter, in the event that the circumstances and conditions shall have changed so that the rates fixed in the order entered by said Commission on the 27th day of April, 1907, shall not, under such changed circumstances and conditions, be in violation of the constitutional rights of the Complainant invoked in the Bill of Complaint in this suit, apply to this court by such proper proceedings as they may be advised for a further order in that behalf;

And it is further adjudged, ordered and decreed that the Complainant recover of the defendants its costs in this behalf expended, to be taxed by the Clerk.

J. C. PRITCHARD,
U. S. Circuit Judge.

December 26th, 1907.

388 *Injunction.*

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump), HENRY C. STUART, JOSEPH E. WILLARD, and R. T. WILSON, Defendants.

The President of the United States of America to Robert R. Prentis, Henry C. Stuart, Joseph E. Willard, and R. T. Wilson, and to their agents, servants and employees and successors in office, and each and every of them, and to the owners, proprietors and managers of all newspapers published in the City of Richmond, Virginia, and each of them, Greeting:

Whereas the Honorable Judge of the Circuit Court of the United States for the Eastern District of Virginia, has on the 26th day of December, 1907, made perpetual the interlocutory injunction awarded in the above-styled cause on the 10th day of July, 1907.

Now, therefore:

1. The defendants Robert R. Prentis, Henry C. Stuart, and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and each and all of their successors in office, each and every of their servants, agents, and employees be, and they hereby are, perpetually restrained and
389 enjoined from publishing, or having published, in any newspaper published in the city of Richmond, Virginia, as against the Complainant herein, the general order of the State Corporation Commission of Virginia bearing date the 27th day of April, 1907, in respect to passenger rates, in the bill in this cause mentioned, and from taking any other step or steps whatsoever under the constitution or laws of the State of Virginia, or otherwise, to enforce against the said Complainant the requirements of said order.

2. The defendant Richard T. Wilson, Clerk of the State Corporation Commission of Virginia, his successors in office and his servants, agents and employees, be, and they hereby are, perpetually restrained and enjoined from publishing or having published, as against said Complainant herein, said order of the State Corporation Commission of Virginia in any newspaper published in the City of Richmond, Virginia.

3. The owners, proprietors and managers of any and all newspapers published in the City of Richmond, Virginia, and the agents of any such owners, proprietors or managers of any such newspaper published in the City of Richmond, Virginia, be and they and each and every one of them are, hereby perpetually enjoined and restrained from publishing or having published, as against the Complainant herein, under the direction of the State Corporation Commission of Virginia, or of the Clerk thereof, said general order of

said State Corporation Commission of Virginia, entered on the 27th day of April, 1907.

Hereof fail not under penalty of the law thence ensuing.

390 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of Richmond, Virginia, in said District, this Thirteenth day of January, in the year of our Lord one thousand nine hundred and eight, and of our Independence the 132nd year.

[Seal of United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Marshal's Return.

Executed January 13th, 1908, by delivering in person in the City of Richmond, Va., to Robert R. Prentis, Henry C. Stuart, Joseph E. Willard, R. T. Wilson and to Joseph Bryan, he being the President of the Richmond Times-Dispatch Co., a newspaper published in the City of Richmond, Va., and to Alfred B. Williams, he being the President of the News-Leader, a newspaper published in the City of Richmond, Va., and to A. R. Holderby, Jr., he being the Secretary-Treasurer and likewise a director of the Evening Journal, a newspaper published in the City of Richmond, Va., to each of them a true copy of this injunction order.

MORGAN TREAT,
United States Marshal.

391 *Petition for Appeal.*

Filed December 26th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump), HENRY C. STUART, JOSEPH E. WILLARD, and R. T. WILSON, Defendants.

To the Honorable J. C. Pritchard, Judge of said Court:

Your petitioners, the above-named defendants, and each of them, individually, and also in the capacity in which they are respectively impleaded in this cause, respectfully represent and complain that, in the record and proceedings had in said cause, and also in the final decree entered in said cause, on the 26th day of December, 1907, by

the said court at its present term, manifest error hath happened and been committed, to the great injury and damage of said defendants.

Wherefore, the said defendants, and each of them, individually and also in the capacity in which they are respectively impleaded in said cause, conceiving themselves aggrieved, by said error, as aforesaid, hereby respectfully appeal from said decision and decree to the Supreme Court of the United States; and they pray that this, their said appeal, may be allowed, and that a transcript of the record, papers, and proceedings, upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States; and also that an order be made fixing the amount of
392 security which said defendants shall give and furnish upon such appeal.

Accompanying this petition are the assignments of error required by the rules of the said last-named court, and said defendants are ready to give and furnish the bond likewise required by said rules.

And your petitioners will ever pray, etc.

Dated December 26th, 1907.

WILLIAM A. ANDERSON,
Richmond, Va.,
A. C. BRAXTON,
Richmond, Va.,
JOHN W. DANIEL,
Lynchburg, Va.,
Attorneys and Solicitors for the said Defendants and Appellants.

393 *Assignment of Errors.*

Filed December 26th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump), HENRY C. STUART, JOSEPH E. WILLARD, and R. T. WILSON, Defendants.

Come now the said defendants, and each of them individually, and also in the capacity in which they are respectively impleaded in this cause, and file the following assignment of errors along with and accompanying their petition for appeal from the final decree entered by this Honorable Court, at its present term, on the 26th day of December, 1907, in the above-entitled cause, upon which errors they and each of them will rely, upon their said appeal:

First.

That the court erred in assuming, asserting and retaining jurisdiction of said defendants, and of said cause.

Second.

That the court erred in not sustaining the validity of the several constitutional and statutory provisions of the laws of Virginia, creating the State Corporation Commission of Virginia, and prescribing its powers and modes of procedure, which said provisions are set forth in the record of said cause, and which were, by the complain-
394 ant in said cause, "claimed to be in contravention of the Constitution of the United States."

Third.

That the court erred in finding and adjudging that the "law" of the Commonwealth of Virginia, embodied in and created by the order of the State Corporation Commission of Virginia, dated April 27th, 1907, and set forth in the record of said cause, was, as "claimed to be," by the complainant in said cause, "in contravention of the Constitution of the United States."

Fourth.

That the court erred in overruling the demurrer to the bill in said cause.

Fifth.

That the court erred in overruling the joint and separate plea filed by three of the defendants in said cause on August 5th, 1907.

Sixth.

That, if the court had jurisdiction of said cause, and of said defendants, then it erred in overruling the plea of *Res Adjudicata* filed by the defendants in said cause.

Seventh.

That the court erred in not making, rendering and entering a decree in favor of the said defendants, and against the said complainant.

The foregoing specific assignments of error cover, as it is believed, the requirements of the Rule under which they are filed; but the said defendants, as Appellants, by their counsel, in view of the im-
395 portance of this cause and the wide range of subjects necessarily involved in its proper consideration and determination, will pray the Honorable, the Supreme Court of the United States, for leave to discuss, at the hearing, all the subjects involved in said appeal, and not to confine them to the specific points designated above.

Wherefore, the said defendants, as Appellants, pray that the final decision and decree of the said court in this cause be reversed by the Supreme Court of the United States, and the said Circuit Court

of the United States for the Eastern District of Virginia be directed to enter an order, dismissing this cause, at the costs of said complainant.

Dec. 26th, 1907.

WILLIAM A. ANDERSON,
A. C. BRAXTON,
JOHN W. DANIEL,
Attorneys and Solicitors for the said Defendants and Appellants.

396 *Order Allowing Appeal and Fixing Amount of Bond.*

Entered and Filed December 26th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

NORFOLK AND WESTERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Upon motion of William A. Anderson, A. Caperton Braxton and John W. Daniel, Esquires, counsel for defendants, and on filing petition of Henry C. Stuart, Joseph E. Willard, Robert R. Prentis, and R. T. Wilson, individually and also in the capacity in which they are respectively herein impleaded, for an order allowing an appeal, together with an assignment of errors accompanying the said petition,

It is ordered, on this, the 26th day of December, 1907, that an appeal be, and is hereby in open court allowed to the Supreme Court of the United States from the final order and decree entered herein on the 26th day of December, 1907, at this term of this court, perpetuating the injunction heretofore awarded against said defendants; that the amount of the bond upon said appeal be, and hereby is, fixed at the sum of One Thousand Dollars; and that a certified transcript of the record and proceedings herein be forthwith transmitted to the Supreme Court of the United States.

December 26th, 1907.

J. C. PRITCHARD,
U. S. Circuit Judge.

397 *Appeal Bond.*

Filed January 14th, 1908.

Know all men by these presents, That we, Richard T. Wilson of Richmond, Virginia, as principal, and Virginia Trust Company as surety, are held and firmly bound unto Norfolk and Western Railway Company in the full and just sum of One Thousand Dollars

to be paid to the said Norfolk and Western Railway Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 14th day of January, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Circuit Court of the United States for the Eastern District of Virginia, in a suit depending in said Court, *between* Norfolk and Western Railway Company, is Complainant, and Robert R. Prentis (Substituted defendant for Beverley T. Crump), Henry C. Stuart, Joseph E. Willard and Richard T. Wilson are Defendants, a decree was rendered against the said Robert R. Prentis, (Substituted defendant for Beverley T. Crump), Henry C. Stuart, Joseph E. Willard, individually, and as constituting the State Corporation Commission of Virginia, and Richard T. Wilson, Clerk of the said State Corporation Commission of Virginia, and the said Robert R. Prentis, (Substituted defendant for Beverley T. Crump), Henry C. Stuart, Joseph E. Willard, individually, and as constituting the State Corporation Commission of Virginia, and Richard T. Wilson, Clerk of the said State Corporation Commission of Virginia, having obtained an appeal to reverse the decree in the
398 aforesaid suit, and a citation directed to the said Norfolk and Western Railway Company citing and admonishing it to be and appear at a Supreme Court of the United States, at the city of Washington, on the day in the said citation mentioned:—

Now, the condition of the above obligation is such, That if the said Robert R. Prentis, (Substituted defendant for Beverley T. Crump), Henry C. Stuart, Joseph E. Willard and Richard T. Wilson shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

RICHARD T. WILSON. [SEAL.]
VIRGINIA TRUST CO.,
By L. D. AYLETT, *Sec'ty.*

[Seal of Virginia Trust Co.]

Sealed and delivered in presence of

JOSEPH P. BRADY,
Clerk U. S. Circuit Court for the Eastern District of Virginia.

Approved by—

J. C. PRITCHARD,
United States Circuit Judge.

399 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Norfolk and Western Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, on the 10th day of February, A. D., 1908, pursuant to an appeal, duly allowed by the Circuit Court of the United States for the Eastern District of Virginia, and filed in the clerk's office of said Court, on the 26th day of December, A. D., 1907; in a cause wherein Robert R. Prentis, (Substituted defendant for Beverley T. Crump), Henry C. Stuart and Joseph E. Willard, individually, and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of said State Corporation Commission of Virginia, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. C. Pritchard, Judge of the Circuit Court of the United States for the Eastern District of Virginia, this 14th day of January, in the year of our Lord one thousand nine hundred and eight, and of our Independence the 132nd year.

J. C. PRITCHARD,
United States Circuit Judge.

Service of the above citation is hereby admitted this 15th day of January, 1908.

JOSEPH I. DORAN,
LUCIAN H. COCKE,
Attorneys for Appellee.

Addresses: (Joseph I. Doran, Philadelphia, Penn. Lucian H. Cocke, Roanoke, Va.)

400 *Order Transmitting Record.*

And, thereupon, it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

JOSEPH P. BRADY, *Clerk.*

Certificate of Clerk.

UNITED STATES OF AMERICA, *Eastern District of Virginia, ss:*

I, Joseph P. Brady, Clerk of the Circuit Court of the United States for the Eastern District of Virginia, in the Fourth Judicial Circuit, do certify that the above and foregoing is a full, true and correct transcript of the record and proceedings of said Circuit Court, together with all things thereunto relating, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at the City of Richmond, Virginia, this 3d day of February, A. D., 1908.

[Seal United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Endorsed on cover: File No. 21,013. E. Virginia C. C. U. S. Term No. 274. Robert R. Prentis, Henry C. Stuart, and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, *et al.*, appellants, *vs.* Norfolk & Western Railway Company. Filed February 10th, 1908. File No. 21,013.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 275.

ROBERT R. PRENTIS, HENRY C. STUART, AND JOSEPH E. WILLARD, INDIVIDUALLY AND AS CONSTITUTING THE STATE CORPORATION COMMISSION OF VIRGINIA, AND R. T. WILSON, CLERK OF THE STATE CORPORATION COMMISSION OF VIRGINIA, APPELLANTS,

vs.

SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED FEBRUARY 19, 1906.

(21,014.)

(21,014.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 275.

ROBERT R. PRENTIS, HENRY C. STUART, AND JOSEPH E. WILLARD, INDIVIDUALLY AND AS CONSTITUTING THE STATE CORPORATION COMMISSION OF VIRGINIA, AND R. T. WILSON, CLERK OF THE STATE CORPORATION COMMISSION OF VIRGINIA, APPELLANTS,

vs.

SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 15, 1908.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Southern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, on the 10th day of February, A. D. 1908, pursuant to an appeal, duly allowed by the Circuit Court of the United States for the Eastern District of Virginia, and filed in the clerk's office of said Court, on the 26th day of December, A. D. 1907; in a cause wherein Robert R. Prentis, (Substituted defendant for Beverley T. Crump), Henry C. Stuart and Joseph E. Willard, individually, and as constituting the State Corporation Commissoin of Virginia, and R. T. Wilson, Clerk of said State Corporation Commission of Virginia, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. C. Pritchard, Judge of the Circuit Court of the United States for the Eastern District of Virginia, this 14th day of January, in the year of our Lord one thousand nine hundred and eight, and of our Independence the 132nd year.

J. C. PRITCHARD,
United States Circuit Judge.

Service of the above citation is hereby admitted this 15th day of January, 1908.

ALFRED P. THOM,
Attorney for Appellee (*Washington, D. C.*).

b [Endorsed:] No. 576. Circuit Court of the U. S. Eastern District of Virginia. In Equity. Southern Railway Company, Complainant, *vs.* Robert R. Prentis (Substituted defendant for Beverley T. Crump), and others, Defendants. Citation. Filed this — day of ——, 190–. —— ——, Clerk.

1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a Circuit Court of the United States for the Eastern District of Virginia, begun and held at the Court Rooms in the Custom House, in the City of Richmond, Virginia, on the first Monday in October, being the seventh day of the same month, in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable J. C. Pritchard, Judge of the Circuit Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump), HENRY C. STUART, and JOSEPH E. WILLARD, Individually and as Constituting the State Corporation Commission of Virginia, and RICHARD T. WILSON, as Clerk of the State Corporation Commission of Virginia, Defendants.

2 *Bill of Complaint.*

Filed May 8th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia, to-wit:

In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
BEVERLEY T. CRUMP, H. C. STUART, JOS. E. WILLARD, and R. T. WILSON, Defendants.

To the Honorable Judges of said Court:

The Bill of Complaint of Southern Railway Company, a corporation of the State of Virginia, duly organized and existing under and by virtue of the laws of that State, having its principal office in the City of Richmond, in the State of Virginia, and being a citizen of said State, against Beverley T. Crump, Henry C. Stuart, Joseph E. Willard, and R. T. Wilson, defendants, all of said defendants being likewise citizens of the State of Virginia.

And thereupon your complainant says:

1. That the complainant is a railroad company duly created, organized, existing and doing business under the laws of the State of Virginia, by virtue of three certain Acts of the General Assembly of Virginia, approved respectively February 20, 1894, Jan-
3 uary 23, 1900, and February 26, 1902, and respectively entitled in the order named:

"An act authorizing the purchasers of the Richmond and Danville Railroad Company, their assigns and successors, to become and be a corporation, and adopt a name therefor, and to possess and exercise general powers, and to authorize the lease to or by, and the consolidation therewith of, other corporations;"

"An act to provide for the reduction of the capital stock and the issue of special stock of Southern Railway Company," and

"An act to amend and re-enact section seven of an act approved February 20, 1894, entitled "An act authorizing the purchasers of the Richmond and Danville Railroad Company, their assigns and

successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers, and authorizing the lease to or by, and the consolidation therewith of, other corporations."

A true copy of which three several acts and a true copy of the certificate of organization required by the third paragraph of the said act of February 20, 1894, filed in the office of the Secretary of the Commonwealth of Virginia on the 14th day of December, 1894, are herewith filed as a part of this bill, marked Exhibit A.

This complainant was duly organized into a corporation in the year 1894, under and by virtue of said first-mentioned act, and is now and has continuously since then been a corporation existing and doing business under the said laws of the State of Virginia and the general statutes of that State applicable thereto.

2. That by the terms of its charter it was authorized to own, operate and control lines of railroad in other States as well as in Virginia, and under and by virtue of such powers, and under and by virtue of due authority from the States about to be mentioned, the complainant owns, or controls, and operates, and continuously since its said organization has operated and controlled, lines of railroad in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Indiana and Illinois. That portion of its road lying in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi and Tennessee constitutes a continuous system of railroads and is 6989.12 miles in length; and that portion of its lines lying in the States of Kentucky, Indiana and Illinois constitutes another continuous system of railroads, and is 526.73 miles in length.

4 These two systems are not connected by rails owned by this complainant, but are connected by traffic arrangement with another line of road. The lines of this complainant in the State of Virginia are 965.63 miles in length.

3. That the complainant is, and continuously since its organization aforesaid has been, engaged in doing an intrastate business as a common carrier of freight and passengers in the State of Virginia, and, in addition, is, and continuously since its said organization has been engaged in doing as a common carrier of freight and passengers a large interstate business in said State of Virginia, and in and between said State and the other States aforesaid, and other States of the United States, and in and between other States and Territories of the United States, and also is, and since its said organization has been, engaged in said State and the other States aforesaid in foreign commerce with other countries.

4. The complainant shows that there has been established in the State of Virginia by a provision of the Constitution of that State a commission, denominated in said Constitution the State Corporation Commission. The constitutional provisions referred to, establishing such commission, are contained in sections of the Constitution of Virginia numbered 155 and 156, herewith filed as a part of this bill and marked Exhibit B to which special reference is hereby made.

The complainant respectfully shows that the said provisions in the Constitution of the State of Virginia seek to confer upon the

said commission administrative, executive, legislative and judicial powers and functions in respect to the same matter, and, as applied and proposed to be applied to this complainant and to its property in the premises, do not constitute due process of law, nor afford to this complainant the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

This complainant further and additionally pleads and shows that Section five of the bill of rights of Virginia, which in the Constitution of that State is declared to be "the basis and foundation of government," provides as follows:

"That the legislative, executive, and judicial departments of the State should be separate and distinct;"

and the 39th Section of the Constitution of Virginia provides:

"Except as hereinafter provided, the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others,
5 nor any person exercise the power of more than one of them at the same time."

The single exception alluded to in Section 39 of said Constitution embraces matters relating to the performance by transportation and transmission companies of their public duties and their charges therefor, in regard to which alone the separation of the legislative, executive and judicial departments is by the Constitution of Virginia denied.

While, therefore, for the protection of every other interest in Virginia, a judicial tribunal is provided by the constitution and laws of that State which is not clothed with legislative and executive functions in respect to the matters in which it is required to exercise its judicial functions, and, therefore, by the law of its creation, is capable of judicial consideration and judicial action in respect to them, this, by the constitutional system of Virginia, is denied to transportation and transmission companies in respect to controversies arising about their public duties and their charges therefor. In respect to these, the said Commission has been established by the Constitution, which seeks to impose, and, if valid, does impose upon the Commission the duty, or invest it with the power, of instituting proceedings before itself in respect to the public duties of transportation and transmission companies and their charges therefor, without any other party complainant except the Commission itself; of legislating thereon and making rules and orders in respect thereto, after the proceedings have been thus instituted before it by itself; of enforcing, as a court, compliance with the orders or requirements which it has made in the matters thus brought before it and thus legislated on or ruled upon, and, in the same matters, of adjudging or enforcing against the defendants the fines and penalties prescribed or authorized by the Constitution or by law.

This Complainant respectfully submits that this Commission, by the law of its creation, is thus, and is otherwise, as will appear
6 from the said Constitution, made incapable of the judicial consideration and judicial action in respect to the large

interests above mentioned of transportation and transmission companies which due process of law requires; and in the knowledge that it has powers as a judicial tribunal to pass upon the validity of its acts in the other capacities referred to, it is put in a position of freedom from the usual and necessary restraints of legislative bodies in respect to matters about which it may legislate. In subjecting these large interests to a tribunal thus created, and denying to them the protection of judicial tribunals which are not clothed with legislative, administrative and executive functions in respect to matters in which they are called upon to exercise their judicial functions, such as are provided for every other interest in the State by the Constitution and laws of Virginia, and in subjecting them to the legislative power of this tribunal, unlimited and unchecked by the ordinary and orderly responsibility to an independent judicial tribunal, the said Constitution not only does not constitute, in respect to transportation and transmission companies, due process of law, but it likewise denies to them the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of its property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

And the complainant respectfully prays the benefit and protection of the said Fourteenth Amendment to the Constitution of the United States in respect to the action of the said Commission, hereinafter mentioned in this bill.

5. Acting under the alleged authority of sub-section (*b*) of Section 156 of the Constitution of Virginia, aforesaid, the State Corporation Commission, on the thirty-first day of July, 1906, issued the following notice:

"*Notice.*

Office of the State Corporation Commission.

RICHMOND, VA., 31*st Day of July*, 1906.

To the Several Steam Railroad Companies Doing Business in Virginia and all Persons Interested:

Take notice that the State Corporation Commission will, in the City of Richmond, on Thursday, the first day of November, 1906, at 12 o'clock, noon, in accordance with the authority conferred by the Constitution of Virginia, and the statutes enacted by the General Assembly of Virginia pursuant thereto, hear and consider any objections which may be urged against a rule, regulation, order or requirement of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia said maximum rate to be observed whether the transportation be entirely over the line of one railroad company, or joint transportation over the lines

of two or more companies: and whether the contract for
7 transportation of a passenger or passengers be evidenced by an ordinary ticket between stations, by a mileage book or otherwise; the Commission to have, as authorized by law, the power and authority from time to time, and as often as circumstances may require, to change or revise the rate, or by rules, regulations and requirements to provide for the more convenient and expedient putting into effect and proper observance of said maximum rate. At the said hearing and consideration of the said maximum rate of two cents per mile, the method, time and extent of promulgation and putting into effect of the same will be heard and determined by the Commission, to the end that a maximum rate for passenger transportation may be put into effect and be made applicable to all steam railroad companies doing business in Virginia, and be properly observed by them in the transportation of passengers.

BEVERLEY T. CRUMP, *Chairman;*
H. C. STUART,
JOSEPH E. WILLARD,
Commissioners."

This notice was published once a week for four consecutive weeks in the Times-Despatch, a newspaper of general circulation, published in the City of Richmond.

In accordance with said notice, the Complainant appeared before the Commission on the first day of November, 1906, and filed an answer, a copy whereof is herewith filed as a part of this bill marked Exhibit C, showing objections against the proposed maximum passenger rate of two cents per mile, and thereafter, in due course, introduced evidence before said Commission to show the reasons why the said maximum passenger rate of two cents per mile should not be established. Notwithstanding this, however, and notwithstanding the fact that the evidence before the Commission conclusively showed, as this Complainant is advised, that the said maximum passenger rate of two cents per mile should not, in justice, and could not constitutionally, be established to govern the passenger rates of this Complainant in the State of Virginia, and that to attempt to establish the same would amount to confiscation of this Complainant's property, contrary to the Fourteenth Amendment to the Constitution of the United States, the said Commsision on the twenty-seventh day of April, 1907, entered the following order:

8 "COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

In the Matter of Prescribing a Maximum Passenger Rate.

CITY OF RICHMOND, *27th Day of April*, 1907.

The State Corporation Commission having carefully considered all the proceedings herein, and all the testimony, exhibits and state-

ments adduced and filed before it in this proceeding, and having put its conclusions in writing, which are made a part of the record herein, the Commission, in order to carry out its said conclusions, now makes the following order and regulations and prescribes the following maximum rates to be observed by all the steam railroad companies operating in the State of Virginia in the transportation of passengers.

1. *It is Ordered*, That on and after the first day of July, 1907, the following steam railroad companies, viz:

Norfolk & Western Railway Company
Chesapeake & Ohio Railway Company
Atlantic Coast Line Railroad Company
Seaboard Air Line Railway Company
Southern Railway Company
Richmond, Fredericksburg & Potomac Railroad Company
Washington Southern Railway Company
New York, Philadelphia & Norfolk Railroad Company
Virginia & Southwestern Railway Company
Louisville & Nashville Railroad Company

shall put into effect and observe a maximum rate of two cents per mile in the intrastate transportation of passengers in Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one of the said railroad companies or joint transportation over the lines of two or more companies; and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than two cents per mile for the transportation of passengers over the lines controlled and operated by them respectively, except as otherwise allowed in this order or from time to time by the State Corporation Commission.

2. *It is Ordered*, That a maximum rate of two and one-half cents per mile for the intrastate transportation of passengers be
9 fixed and prescribed to go into effect on and after the first day of July, 1907, on the following divisions, or branches, of the Southern Railway Company, which are now excepted from the operation of the maximum rate of two cents per mile hereinabove fixed.

Norfolk Division, extending from Pinners Point to Danville, 204 miles, exclusive of so much of the said division as may be in the State of North Carolina;

Franklin Branch, extending from Franklin Junction to Rocky Mount, 37 miles;

Claremont Branch, extending from James River Junction to Claremont, 50 miles.

From and after the said date it shall be unlawful for the Southern Railway Company to charge or collect a greater sum than two and one-half cents per mile for the intrastate transportation of passengers over these divisions, or branches, unless otherwise directed or allowed by the Commission.

3. *It is Ordered,* That on and after the first day of July, 1907, the following steam railroad companies, viz.,

Chesapeake Western Railway
Cumberland Valley & Martinsburg Railroad Company
Danville & Western Railway Company
Indian Creek & Pound River Railroad Company
Marion & Rye Valley Railway Company
Nelson & Albemarle Railway Company
Valley Railroad Company of Virginia
Virginia-Carolina Railway Company
Virginia Southern Railroad Company
Winchester & Potomac Railroad Company
Winchester & Strasburg Railroad Company
Norfolk & Southern Railway Company

shall put into effect and observe a maximum rate of three cents per mile in the intrastate transportation of passengers in Virginia, and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than three cents per mile for the transportation of passengers over the lines controlled and operated by them respectively, except as otherwise allowed from time to time by the State Corporation Commission.

4. *It is Ordered,* That on and after the first day of July, 1907, the following steam railroad companies, viz.,

Big Sandy & Cumberland Railroad Company
Black Mountain Railway Company
Interstate Railroad Company
Lick Creek & Lake Erie Railroad Company
Mr. Airy & Eastern Railway Company
New River, Holston & Western Railroad Company
Potomac, Fredericksburg & Piedmont Railroad Company
Surry, Sussex & Southampton Railway Company
Tidewater & Western Railroad Company
Virginia Anthracite Coal and Railroad Company
Virginia & Kentucky Railway Company
Wise Terminal Company

shall put into effect and observe a maximum rate of three and one-half cents per mile in the intrastate transportation of passengers in Virginia, and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than three and one-half cents per mile for the transportation of passengers over the lines controlled and operated by them respectively, except as otherwise allowed from time to time by the State Corporation Commission.

5. *It is Further Ordered,* That in applying the foregoing maximum passenger rates prescribed for the several railroads in Virginia, the railroad companies may charge and collect a minimum rate of ten cents per passenger for any single haul.

6. The payment of fares subject to the maximum rate herein

prescribed shall entitle the passenger to the same transportation of baggage as now allowed by the carriers under and in connection with the present rates, and no steam railroad company operating in Virginia shall change or alter the rules governing the rights of passengers with respect to the transportation of baggage in Virginia, without the consent of the Commission first obtained.

7. Steam Railroad Companies operating in Virginia may charge and collect in addition to regular ticket rates the fixed sum of ten cents from all cash fare passengers who had been afforded reasonable opportunity for purchasing ticket- before boarding train; provided that the Conductor shall in all such cases deliver to passengers a receipt for the amount collected redeemable at any ticket office of the Company within thirty days from date of issue.

It is Ordered, That the Clerk of the Commission do forthwith publish this order in full in one of the newspapers of general circulation published in the City of Richmond, once a week for four successive weeks, as required by law."

Under the constitutional system of Virginia, the said order of the Commission cannot take effect until the same is published once a week for four consecutive weeks in some newspaper of general circulation published in the City of Richmond, and, accordingly, the said Commission, in said order, ordered that the Clerk
11 of the Commission do forthwith so publish said order, and unless prohibited by the order of this Honorable Court he will at once proceed to complete or continue such publication as to the complainant.

6. This complainant further shows that at the time of its incorporation and organization, as shown in paragraph 1. of this bill, there were in existence in the State of Virginia, entering into and forming a part of the charter of this Complainant, certain public laws of the State which had theretofore been passed, and which had been enacted into the act commonly known as the Code of Virginia of 1887, namely, Sections 1202, 1240 and 1242 thereof, a true copy of which sections is herewith filed as a part of this bill, marked Exhibit D, and this Complainant shows that the said Sections 1202, 1240 and 1242 of the said Code were inducements for it to accept its charter, to organize into a corporation, to acquire by purchase the property in said State which it now owns, and controls, and operates as above mentioned, and to do business, as above set forth, and the same were accepted by it and entered into and became a part of the contract between it and the State of Virginia.

Relying upon its said charter and the said public laws above referred to as a part thereof, this complainant caused itself to be organized, purchased and acquired its said property in the State of Virginia and made, issued and caused to be sold its bonds and stocks to the amount of many millions of dollars; and the purchasers of the same, in making their investments in the said bonds and stocks of this complainant, also relied upon the said contractual obligations which existed between this complainant and the State of Virginia, and this complainant has in all respects organized, man-

aged and adjusted its affairs and conducted its business in like reliance upon its said contract with the State of Virginia.

While the General Assembly of Virginia, in enacting said public laws above referred to, reserved the right to alter, modify and repeal the charters of any railway company governed thereby, it expressly excepted, from such right of alteration, modification or repeal, the power to change the tolls of this company without its assent as follows:

"Except that no law shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent in any other cases except such as are specially provided for in this chapter."

and thereby secured to this complainant, as a contractual right with the State of Virginia, the right to charge, receive and collect the tolls as fixed and established and permitted in said public acts.

12 This complainant denies that any of the events have happened which satisfy the conditions precedent established by said statute to the exercise of any right on the part of the State of Virginia to change the tolls of this complainant without its assent; and likewise denies that any exceptional case has arisen or exists such as is specially provided for in the chapter last herein referred to. The net profits of this complainant have never amounted to a sum equal to its capital stock with six per centum per annum interest thereon; its net profits have never been such that dividends might be declared out of the same exceeding, or as much as, the rate of fifteen per centum per annum on the capital stock invested; and the net profits of this complainant have never been such that any dividend could have been declared, and no dividend has been declared, so much as thirty years before the notice issued in this cause, this complainant only having been organized about twelve years ago, and its first dividend on its preferred stock, amounting only to one per centum per annum, having been declared in the year 1896, and having been made payable January 4, 1897, and no dividend on the common stock of this complainant ever having been declared, and no dividend thereon ever having been possible, out of the net profits of this complainant.

No dividend has been declared on any of its stock since this complainant was organized, except as follows:

Dividend number.	Par pref. stock.	%	Am't of div.	Paid.
1	$54,300,000	1	$543,000.00	January, 1897.
2	54,300,000	1	543,000.00	January, 1898.
3	57,290,400	1	572,904.00	January, 1899.
4	60,000,000	1	600,000.00	October, 1899.
5	60,000,000	1½	900,000.00	April, 1900.
6	60,000,000	1½	900,000.00	October, 1900.
7	60,000,000	2	1,200,000.00	April, 1901.
8	60,000,000	2	1,200,000.00	October, 1901.
9	60,000,000	2½	1,500,000.00	April, 1902.
10	60,000,000	2½	1,500,000.00	October, 1902.

Dividend number.	Par pref. stock.	%	Am't of div.	Paid.	
11	$60,000,000	2½	$1,500,000.00	April,	1903
12	60,000,000	2½	1,500,000.00	October,	1903.
13	60,000,000	2½	1,500,000.00	April,	1904.
14	60,000,000	2½	1,500,000.00	October,	1904.
15	60,000,000	2½	1,500,000.00	April,	1905.
16	60,000,000	2½	1,500,000.00	October,	1905.
17	60,000,000	2½	1,500,000.00	April,	1906.
18	60,000,000	2½	1,500,000.00	October,	1906.
19	60,000,000	2½	1,500,000.00	April,	1907.

13 This complainant has not, since the passage of an act of the General Assembly of the State of Virginia, entitled "An Act Concerning Corporations," which became a law on the 21st day of May, in the year 1903, either purchased, merged or consolidated with itself any railroad competitive with it between points both of which are in the State of Virginia, nor has it, since the passage of the last mentioned act, accepted or effected any amendment to, or of, its charter thereunder, and it expressly avers that it has never, at any time nor does it now, assent to any change in its tolls or rates, and it has not in any way waived or lost the right guaranteed to it by the said contract with the State of Virginia in respect to its tolls or rates.

On the contrary, this complainant insists that it is entitled to the benefit of Paragraph One of Section Ten of Article One of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of a contract, and submits that, inasmuch as the State of Virginia cannot take action having this effect, it is not within the power of the said Commission, organized and existing under the laws of the State of Virginia and exercising in that regard no greater power than the power of the State in the premises, to impair the obligation of the contract hereinbefore set forth by the adoption and promulgation of the proposed rule, regulation, order or requirement, which materially changes the rates and tolls of this complainant as they at present exist and reduces them materially below the amounts permitted by its said contract with the State of Virginia, and this complainant prays that it may have in the premises the full benefit of the provisions of the Constitution of the United States hereinbefore referred to, for the preservation of its contractual rights in respect to its rates and tolls.

7. The effect of the said order of the State Corporation Commission of Virginia, if enforced, would, as will appear from the considerations now about to be set forth, be to deprive the complainant of its property without just compensation and without due process of law, and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which the complainant respectfully sets up and claims.

The existing passenger rates and charges in effect upon this complainant's lines in the State of Virginia, and applicable to intrastate business in said State, are not higher than three cents a mile, and

are not higher than is just and reasonable, whether considered in respect to the value of the property used by this complainant
14 in the public intrastate service in Virginia, or in respect to the value of the service rendered to the travelers upon its lines. The said rates are less than the said complainant is permitted to charge by its said contract with the State of Virginia.

The complainant shows that the effect of the rates set forth in the said order of the Commission, and now proposed to be put into effect by it upon the business of this Complainant, between points both of which are in the State of Virginia, and which does not pass out of said State en route, for the year ended June 30, 1905, is as follows, except for the slight difference hereinafter indicated:

The maximum actual net earnings from Virginia intrastate business for said year, after deducting the proper proportion of improvements and betterments not capitalized, and the proper proportion of taxes, were	$182,817.64
Whereas, under a flat rate of two cents per mile in Virginia such maximum net intrastate earnings on the business of the same year would be	1,639.46
Showing a reduction of such actual net earnings from Virginia intrastate business for said year under a rate of two cents per mile of	181,178.18

The foregoing maximum net earnings are arrived at as follows:

The maximum earnings from intrastate traffic in Virginia, after paying the cost of operation for said year amounted to	278,915.29
The ratio of the intra-state gross traffic revenue in Virginia for said year to the entire gross traffic revenue of the Virginia lines of this complainant, covering both inter and intra state traffic in Virginia for said year, is 26.94%.	
26.94% of the gross taxes ($213,339.72) paid in Virginia by complainant in said year is	57,473.72
26.94% of the improvements and betterments, not capitalized, chargeable to complainant's Virginia properties during said year ($143,370.20), is	38,623.93
Total taxes and improvements and betterments so chargeable against intrastate traffic	$96,097.65
Leaving maximum net intrastate earnings as above mentioned, after deducting the said proportion of taxes, improvements and betterments	182,817.64

15 The above figures are given on the basis of a flat passenger rate of two cents per mile on all the lines of this complainant in the State of Virginia, which was the basis suggested by the State Corporation Commission of Virginia in its notice, and no notice has been given to this complainant as required by the Constitution of Virginia, by publication or otherwise, of any inquiry into any different rate than said two cents per mile, and, inasmuch as no such notice has been given of the rate which the Commission has sought to put into effect by its said order upon the lines of this Commission, then the said order is totally void as against this complainant; but, while the exact effect of the two and one half cent rate permitted by the said Commission's order on a few of the minor lines of this complainant in the State of Virginia, to-wit: on the Atlantic & Danville line, about two hundred and four miles in length, where the travel is light; on the Claremont Branch, which is a narrow gauge branch, fifty miles in length, and where the travel is not only light but insignificant; and on the Franklin Branch, about thirty-seven miles in length, where the travel is likewise not only light but insignificant, can not be stated with entire accuracy at this time, this complainant is advised and here shows to the court that the effect of putting into use a two and one half cent rate upon the lines mentioned instead of a two cent rate would only be to increase the intrastate earnings of this complainant over and above the figures above given by about the sum of $6,193.71.

The complainant further shows that the effect of the establishment of the proposed passenger rates and charges would not be limited to the intrastate business in Virginia of this complainant, but would inevitably affect the interstate business of this complainant, and impair and diminish the revenues derived therefrom. This inevitably follows from the fact that all, or nearly all, of its interstate passenger rates within the State of Virginia, are made, and necessarily made, on a combination of locals, or by the use of locals as factors, and where the local rate within the State of Virginia is reduced, the inevitable effect upon the revenues of this complainant from its interstate business would be a reduction, and accordingly the total loss which this complainant would have to incur in the event that the proposed passenger rates and charges are made effective would not be represented merely by the figures above given, but a very considerable and appreciable loss would necessarily be added thereto, growing out of the reductions on its interstate business, as aforesaid.

16 The complainant further shows that there is, in respect to this complainant's property, as in respect to all other classes of property in the State of Virginia, whether owned by individuals or corporations, a difference between the commercial and tax assessment value, the commercial value being, in respect to all classes of property, greater than the value assessed for purposes of taxation, and while this complainant does not admit, but, on the contrary, expressly denies, that the tax assessment value is as great as the value which should be considered for the purpose of determining its right to make reasonable earnings out of, and reasonable returns on, the property used by it in doing its intrastate business

as a common carrier in Virginia, and performing the public service required of it as such, the complainant is advised that the State of Virginia, having made the assessment for the purposes of taxation upon the complainant's property in said State, can not deny that its property in that State is worth at least the amount of said assessment, and, in fact, its property in Virginia is worth more than the amount of said assessment and it would cost more to reproduce it. If, however, the earnings which it can make under the proposed passenger rates and charges are estimated only in reference to the said assessed value of its said property made by the State of Virginia for the purposes of taxation, the complainant avers that the proposed rates and charges will not permit it to earn reasonable profits and enjoy reasonable returns, even upon that valuation, and such rates and charges will deprive it of the legitimate use of its property.

The ad valorem assessment upon the physical properties of the complainant in the State of Virginia for the year ending June 30, 1905, was.....	$12,807,857.00
The franchise tax capitalized at the same rate of taxation as that imposed upon its physical properties, to-wit, thirty-five cents on a hundred dollars, would show a value for said year of.....	$17,069,828.57
Thus making a total assessed value of	$29,877,685.57
Taking the proportion of this valuation which is used for the purpose of producing revenue from intrastate traffic in Virginia in the ratio which the gross intrastate traffic earnings in Virginia bear to the total gross traffic revenue in the State of Virginia, which is the proper method of apportionment, namely, 26.94 per cent., the value of the property of this complainant used in Virginia for intrastate purposes, on the basis of Virginia's assessment for purposes of taxation, is shown to be.....	$8,049,048.49

17 Upon even this valuation the net earnings permitted to this complainant under the proposed passenger rates and charges from its intrastate business in the State of Virginia for said year would only amount to ten one hundredths of one per cent. on such portion of the said taxed value, before allowing anything for payment of interest on its bonds or dividends on its stock.

Whereas, if only the assessed value of the physical properties of this complainant in the State of Virginia be considered and the same proportion thereof be taken as the value of the property used in producing the intrastate revenue in said State, then the earnings of this complainant under the proposed rates and charges would be twenty three one hun-

dredths of one per cent. on such valuation, before allowing anything for the payment of interest on its bonds or dividends on its stock.

Neither of such returns is a reasonable profit upon the invested capital or upon the actual value of the property used.

The complainant further shows that the total bonded indebtedness of this complainant applicable to its Virginia property on the basis of setting out to Virginia all of such indebtedness that is specially a lien upon the Virginia properties, and a lien on no other properties, and taking the Virginia mileage proportion of the general bonded indebtedness of the complainant is	$38,509,438.36
On which the annual interest charge which complainant is obliged to pay was, for said year	$1,718,530.52
And that the annual trackage rentals paid for lines in Virginia by this complainant for said year amounted to	$209,515.17
The net income from intrastate traffic in Virginia should contribute its pro rata proportion to the payment of such interest and rental charges, namely, at least 26.94 per cent., or the sum of	$519,115.51
But the total net earnings from intrastate traffic in the State of Virginia under the proposed rates and charges would not exceed	$7,833.17
Which would leave a deficiency after paying the amount properly apportionable to intrastate traffic in the State of Virginia of such interest and rentals of	$511,582.34

And no return whatever to the owners of said property.

The reduction applicable to the net intrastate revenue of complainant in the State of Virginia, caused by the rates now proposed by said Commission for the year ending June 30, 1906, would be approximately	$190,000.00

18 The complainant further shows that the figures given in this bill, in respect to the result on its revenues for the year ended June 30, 1905, are in their net result fairly representative of past and future conditions, except that the operating expenses of the complainant have, since June 30, 1905, increased relatively far more than its gross earnings, and that the net result will be even more unfavorable, and yield a still smaller relative return to the complainant than is here shown for the year ended June 30, 1905.

Figures given in this bill are, as will be noted, for the year ended June 30, 1905. The reason similar figures are not given for the

year ended June 30, 1906, is that they have not as yet been accurately compiled, but the complainant asks leave in the progress of this cause to give similar figures for the year ended June 30, 1905, which complainant alleges will show practically the same confiscatory consequences of the said proposed passenger fares as are here shown for the year ended June 30, 1905.

The general commercial conditions in Virginia are prosperous; the transportation service rendered by the complainant in intrastate transportation is large, and, at reasonable rates, the returns therefor to this complainant would be much greater.

The complainant further shows that there will be no compensatory increase in the business of this complainant resulting from the proposed reduced rates, and that there will be no appreciable or substantial increase whatever in such business due to such reduced rates.

The lines of railway of this complainant have at all times been operated as economically as practicable, under the existing conditions, and its operating expenses have at all times, under the conditions confronting it, been as reasonably low in amount as they could be made by economical and judicious management, and it has not been possible, under the conditions existing, for the complainant to operate its road for less than it has been operated. In all respects it has confined its operating expenses, its taxes, its interest, and every other expenditure within the lowest and narrowest limit reasonably practicable under existing conditions.

The complainant respectfully shows to this Honorable Court that the result of the said rates and charges would be to deprive this complainant of its property without just compensation, to deprive it of the equal protection of the laws, and to take its property without due process of law, contrary to the Fourteenth Amendment to the
19 Constitution of the United States, the benefit and protection of which it expressly sets up and claims.

8. The complainant further shows that its present rates in Virginia are not higher than a reasonable compensation for the service rendered by it to travelers on its lines, and are in no sense excessive or extortionate; that they are not unjustly, unduly, unreasonably or illegally discriminatory as between individuals, nor as between localities, and that they in no way violate any law. The complainant is advised that it has, as an incident of its property, and as a property right, the right to charge for each service which it renders a reasonable compensation, and that this complainant is protected by the Fourteenth Amendment to the Constitution of the United States in making, receiving and collecting such charge. The effect of the proposed rates and charges would be to materially diminish this complainant's charges, and to reduce them greatly below what would be a reasonable compensation for the respective services rendered to the travelers on its lines. The Complainant is advised that to prevent it from charging a reasonable compensation for the service rendered the traveler would be to deprive it of its property without just compensation, and without due process of law, and would be to deny to it the equal protection of the laws, and this complainant again claims, in this regard, the benefit and protection of the Fourteenth

Amendment to the Constitution of the United States, and shows that if the proposed rates and charges are put into effect the result would be, as aforesaid, to deprive it of its property contrary to the said Fourteenth Amendment to the Constitution of the United States.

9. This complainant is further advised that it has, as an incident of its property, and as a property right, the right to increase its charges whenever, under the circumstances then existing, its charges are less than a reasonable compensation for the service which it renders, and that what may be a reasonable charge today for a service may become an unreasonably low charge tomorrow, or at any time thereafter, if conditions in respect to the expense of the service, or other conditions, are so changed as to make it so. The complainant is therefore advised that any action by a State which attempts to fix a maximum charge beyond which the complainant can not go, no matter how unreasonably low such maximum may become under changed conditions, would be to deprive the complainant of its property right to increase its rate up to what would, under such changed conditions, be a reasonable compensation for the service rendered, and would, therefore, violate the Fourteenth Amendment to the Constitution of the United States. This complainant avers that the said order of the Commission undertakes to fix a maximum beyond which this complainant can not go, no matter what may be the circumstances, and that, therefore, said order is unconstitutional and void, as being in violation of the Fourteenth Amendment to the Constitution of the United States. This complainant further shows that many of its existing rates are lower than is just compensation for the service rendered, and have heretofore yielded, and will continue to yield to the complainant, much less than a reasonable return upon the value of its property employed in such service. Since they were fixed, the operating expenses of the complainant have, without its fault, been largely increased, the cost of equipment, of materials and supplies, and of labor, necessary for its operations, having all largely increased, so that the net return to this complainant has become much less than it has heretofore been, and it is not now, and never has been, as much as this complainant is entitled to receive. All of said maximum rates fixed by the proposed order of the State Corporation Commission are lower than a just compensation for the service rendered, and are lower than would afford this complainant a reasonable and just return upon the value of its property used in performing the services in return for such rates, and that the effect of said order, because thereof, and also because said order undertakes to impose an immovable maximum, is to deprive this complainant of its property without due process of law, and of the equal protection of the laws, and to take its property without just compensation, contrary to the said Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which is again, in this regard, expressly set up and claimed.

10. This complainant further shows that its existing rates are properly adjusted in their relation between its interstate rates and its State rates in Virginia and other states, and that all its charges

are just and reasonable in themselves, and do not and will not give to this complainant more than a just and reasonable return upon the value of its property used in the transportation service which it renders to the public; and that any reduction in its revenues will seriously embarrass and obstruct it in providing, and will deprive it of its power to properly provide, the facilities which the
21 public commerce dependent upon it for transportation absolutely requires for the movement of traffic, both intra and inter state. This complainant is advised that no state has a right to require that its own traffic between points within the state shall be given a preferential service, or shall be carried at preferential and lower rates than other traffic. No state has a right to require such discrimination or partiality in favor of its own traffic. This complainant shows that the effect of the said rates proposed to be put into effect, pursuant to the order of the State Corporation Commission hereinbefore referred to, will be to destroy the proper adjustment of its intrastate rates in Virginia to its interstate rates generally, and to its intrastate rates in other states, and to require that a preference shall be given by this complainant, and an undue discrimination exercised by it, in favor of the intrastate passenger traffic in Virginia over the interstate passenger traffic carried by this complainant, and over the intrastate passenger traffic of this complainant in other states, and that to require such preferential and such undue discrimination in regard to the intrastate passenger traffic of the State of Virginia would be to so regulate and burden interstate commerce as to violate the commerce Clause of the Constitution of the United States, the benefit and protection of which this complainant respectfully sets up and claims.

11. This complainant further shows that there is no just reason for making a rule for some of the railroads different from that made for the complainant in respect to its passenger charges, and that there is no reasonable basis for such difference. Each of the carriers in said State of Virginia is, under the Constitution of the United States, entitled to charge a reasonable compensation for the service rendered, and the difference in rates ordered by the said Commission creates a merely arbitrary classification based upon no proper or sufficient reason. This complainant is, therefore, advised that the effect of said order in making such difference in classification and in permitting one carrier to charge for the same service in Virginia a greater sum than is permitted to another carrier in Virginia is to deprive this complainant of the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, which this complainant, in this regard, here again respectfully sets up and claims.

12. It is provided by the Constitution of Virginia that any corporation failing or refusing to obey any valid order or re-
22 quirement of the Commission within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law) such sum not exceeding five hundred dollars as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be

prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense. And it is further provided that the right of no person to institute and prosecute in the ordinary courts of justice any action, suit or motion against any transportation or transmission company for any claim or cause of action against such company shall be extinguished, or impaired by reason of any fine or other penalty which the Commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the Commission; but in no such proceeding by any person against such corporation, nor in any collateral proceeding shall the reasonableness, justness or validity of any rate, charge, classification or traffic, rule, regulation, or requirement, theretofore prescribed by the Commission, within the scope of its authority, and then in force, be questioned. If, therefore, the said order herein complained of, of the State Corporation Commission, shall be permitted to go into effect, it will subject this complainant to the danger of a multitude of suits based upon such order, and to prosecutions for penalties to enormous amounts. The complainant further shows that unless it is relieved in this cause, the number of actions aforesaid, and the number of actions for penalties to which it will be thus exposed, and which will be thus instituted against it, will be enormous, and it would be seriously and unjustly burdensome and expensive to the complainant to be subjected to the numerous suits and prosecutions for penalties to which it would be subjected if relief herein is not granted. And the tendency of such suits, involving in the aggregate such enormous amounts, would be to depreciate the value of complainant's property and the value of its stocks and bonds, and would greatly impair its credit, and consequently its ability to perform the public service required by the commerce tributary to its lines, and would inflict great and irremediable injury and damage, not only upon the complainant, and upon the holders of its stocks and bonds, but also upon the traveling public.

13. The defendants, Beverley T. Crump, Henry C. Stuart, and Joseph E. Willard, constitute the State Corporation Commis-
23 sion of Virginia, the said Beverley T. Crump being its Chairman, and the said Henry C. Stuart and Joseph E. Willard being associate members thereof, and the said R. T. Wilson is the clerk of said Commission.

14. The complainant shows to the Court that its purpose in this cause is, by an orderly proceeding in the courts, to obtain a judicial determination of its rights under the Constitution of the United States, and, if, as it is advised and believes, its just rights in the premises are imperiled, denied and encroached upon by the order of the State Corporation Commission hereinbefore complained of as contrary to the Constitution of the United States, then to obtain a judicial decree establishing and protecting the rights of this complainant, and to that end it is essential, as alleged in this bill, that an injunction shall be issued; but this complainant does not desire

in any way injuriously to affect any lawful right of the State or of the people of Virginia, or of any other person, and hereby complainant offers and undertakes to do all in its power to maintain the *status quo* during the course of this judicial inquiry, and accordingly it consents, and it prays the court, that there may be, and shall be, adopted herein a proceeding analogous to that provided by subsection (*e*) of Section 156 of the Constitution of Virginia, namely, the execution of a bond by the complainant conditioned to pay into the registry of this court, from time to time, when and as the court may so order, such sum or sums of money as shall be equal to the difference between the aggregate passenger rates charged and received by it, and those fixed by the said order of the commission, and that, as an incident thereto, the complainant shall give to any person purchasing a ticket for travel on its lines in the State of Virginia a transferable coupon or other written evidence, representing the sum to which such person or his transferee will be entitled upon a final decision upholding the constitutionality of such order, such coupons, or the amount covered by such other written evidence, in that event to be payable out of the cash deposit in the registry of this court; and that this complainant, from time to time, shall report to the court at intervals to be fixed by the order of the court herein, statements showing the amount of such passenger fares by it charged and collected, and that from time to time the complainant shall give such further bond or bonds as the Court may require,, to secure the proper payment into court of all amounts which finally it shall be adjudged that it should repay, or reimburse, under the final
24 decision of this court, or upon final review thereof; and that on a final determination herein that this complainant is entitled to the amounts covered by said bond or bonds, the said bonds be released and canceled by the court, and, if any amounts shall have been paid into the registry of the court pursuant thereto, that, upon such determination in favor of the complainant, the sum or sums so paid into the registry shall be repaid to the complainant, without further order of the court herein.

15. The subject matter of this suit now brought before this Honorable Court involves questions arising under the Constitution of the United States and rights asserted by the complainant under said Constitution, and protected thereby, and the amount involved herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars.

16. The complainant avers that it will be irremediably injured unless an injunction be granted as hereinbefore prayed, and relief be given to it in this suit.

In consideration whereof, and forasmuch as your complainant is remediless in the premises under the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end, therefore, that the defendants hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if the same were again here repeated, and they were thereunto specially interrogated, but not under oath answer under

oath being expressly waived the complainant prays that the said defendants be required so to answer and that an injunction may be issued out of this court enjoining and prohibiting the defendants, Beverley T. Crump, Henry C. Stuart, and Joseph E. Willard, constituting the State Corporation Commission of Virginia, and each of them individually, and jointly, as constituting said State Corporation Commission of Virginia, and each and all their successors in office, from publishing, or having published, in any newspaper published in the City of Richmond, Virginia, the said order of the State Corporation Commission, bearing date the 27th day of April, 1907, in respect to passenger rates, and from taking any other step or steps whatsoever under the Constitution or Laws of Virginia, to enforce the requirements of the said order, or so as to hinder or prevent the complainant from increasing its passenger charges, to the extent that such increase may be fair, reasonable and just, and enjoining and prohibiting the defendant, R. T. Wilson, Clerk of the State Corporation Commission, and his successors in office, from publishing, or having published, the said order of the Commission in any newspaper published in the City of Richmond, Virginia, and enjoining and prohibiting the owner, proprietor, manager, or agent of any such owner, proprietor or manager of any newspaper in the City of Richmond, Virginia, from publishing or having published under the direction of the Commission, or the clerk thereof, such order of the Commission: and that the requirements of the said order of the Commission, and each and every provision of the said order, be declared to be unreasonable, unfair and unjust to the Complainant, and unconstitutional, null and void.

That in the meantime, and until a decision can be had upon your Complainant's motion for the injunction herein prayed, a restraining order may be granted, restraining the acts sought herein to be enjoined, your complainant hereby averring that there is danger of irreparable injury from delay if action should not be taken until such motion for an injunction can be tried upon its merits.

That a writ of injunction be issued, etc., commanding, etc., enjoining the defendants as above prayed.

That on a final hearing said injunction as herein prayed may be made perpetual; that the said order of the Commission and each and every requirement thereof be declared null and void by a decree of this court, so far as the same relate to any of your Complainant's said lines of railroad in Virginia, or to any of its business, and that your complainant may have such other and further relief as in justice it may be entitled to, and as to equity is meet.

May it please your Honors to grant unto your complainant the temporary restraining order aforesaid, the writ of injunction aforesaid, and the writ of subpœna addressed to said defendants Beverley T. Crump, Henry C. Stuart and Joseph E. Willard, individually, and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of the State Corporation Commission, commanding said defendants, under a penalty therein named, to appear in this court, on some certain day, to be thereby fixed, to answer the premises and abide by and perform such decree as may be passed

herein, but said answer as above stated not to be made on oath, answer under oath being expressly waived.

26 This is the first application by your complainant for a restraining order or injunction in this cause.

SOUTHERN RAILWAY COMPANY,
Complainant,
By A. R. ANDREWS, *First Vice Pres't.*

CLAUDIAN B. NORTHROP,
ROBERT B. TUNSTALL,
ALFRED P. THOM,
Solicitors for Complainant.

27 UNITED STATES OF AMERICA, *District of Columbia, To wit:*

Personally appeared before me, —— ——, a Notary Public, duly commissioned, qualified and acting as such in and for the District of Columbia, W. H. Tayloe, who, upon being first duly sworn deposes and says:

That he is General Passenger Agent of the Southern Railway Company, the complainant in the foregoing bill of complaint; that he is acquainted with the passenger traffic and tariff of said Company; that he has read the foregoing bill and knows the contents thereof; that the facts therein stated, as of complainant's own knowledge, are true; and that the facts therein stated upon complainant's information and belief, he believes to be true.

W. H. TAYLOE.

Sworn and subscribed to before me this 8th day of May in the year 1907.

My commission as Notary Public expires on the 17th day of July, 1910.

In witness whereof I have hereunto signed my name and affixed my notarial seal at the city of Washington in the District of Columbia, this 8th day of May in the year 1907.

[NOTARIAL SEAL.] HARRY F. PIERCE,
Notary Public.

28 EXHIBIT A.

AN ACT

Authorizing the Purchasers of the Richmond and Danville Railroad, Their Assigns and Successors, to Become and be a Corporation, to Adopt a Name Therefor, and to Possess and Exercise General Powers; and Authorizing the Leasing to or by, and the Consolidation Therewith of, Other Corporations.

[Approved February 20, 1894.]

Whereas, a certain suit in equity is now pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company of New York is com-

plainant, and the Richmond and Danville Railroad Company, a corporation created by and existing under the Laws of the State of Virginia, is defendant, in which suit it is sought to foreclose the consolidated mortgage, dated the twenty-second day of October, in the year one thousand eight hundred and eighty-six, and upon or about that day duly executed, acknowledged and delivered by said railroad corporation to said Central Trust Company of New York, and subsequently supplemented and confirmed by said railroad corporation by instruments dated November first, eighteen hundred and eighty-six, and April thirtieth, eighteen hundred and eighty-eight, respectively, in which suit also it is proposed to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said the Richmond and Danville Railroad Company.

And, whereas, it is deemed desirable and for the interest of this Commonwealth that the said railroad property shall be sold and reorganized in such manner and under such conditions as to secure the largest and best possible facilities and advantages of transportation and communication for the people of this State; now, therefore:

1. *Be it enacted by the General Assembly of Virginia*, that the purchaser or purchasers of the said mortgaged premises of the said the Richmond and Danville Railroad Company at the foreclosure sale thereof in the course of the said suit in equity, and such person or persons as he or they may associate with himself or themselves, shall forthwith be, and they hereby are, constituted a body politic and corporate by the name which they may select, as set forth in the conveyance of said mortgaged premises, or in any writing signed by him or them and recorded in the court in which the said conveyance shall be recorded, and such new corporation shall have, possess and be invested with all the estate, right, title and interest in and to such railroad and other property, with their appurtenances, and all the franchises, rights and privileges had and possessed by the said Richmond and Danville Railroad Company to the same extent as a purchaser under sections twelve hundred and thirty-three and twelve hundred and thirty-four of the Code of Virginia, and shall perform all the duties prescribed by said sections of said Code; provided, however, that said new corporation shall not be limited as to the amount or classification of its stock or bonds, except that the total amount of stock issued shall not exceed three hundred and fifty million dollars, and shall have no immunity from any lawful State, county or municipal taxation by reason of its former charter or any law heretofore exempting it from taxation.

2. Such purchaser or purchasers may associate with him or them any number of persons in the organization of the new corporation, which may create and issue its stock and its bonds secured by mortgage or otherwise, according to any plan adopted by such purchaser or purchasers, and filed as hereinafter provided.

29 3. It shall be the duty of such new corporation within six months after the conveyance to it of said mortgaged premises to execute a certificate in writing under its common seal attested by the signature of its President or Vice-President, referring to the sale

and conveyance by which it shall have acquired title to such premises and the plan of organization adopted by the purchasers, the amount and classes or kinds of capital stock and mortgage bonds or other obligations authorized to be issued, and also specifying the name of such new corporation and of its President, and the number and names of its Directors, which certificate shall be filed in the office of the Secretary of the Commonwealth of Virginia, and a certified copy thereof shall be conclusive evidence of the existence of such new corporation.

4. In addition to its other powers, such new corporation shall have, and from time to time as occasion arises may exercise, the following powers, or any of them, namely:

(*a*) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase or otherwise acquire, or be leased, used, operated by, or consolidated with, any railroad or transportation company now or hereafter incorporated by the laws of the United States, or any of the States thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies which now are or hereafter may be leased, or used, or operated by, or consolidated with any one or more of such railroad or transportation companies; and, from time to time, it may consolidate its capital stock, property and franchises, by change of name or otherwise, with the capital stock, property and franchises of any other railroad or transportation company, power being hereby granted to any railroad or transportation company or companies incorporated by or under any act or acts of the General Assembly of the State of Virginia, with the approval of a majority in amount of its or their shareholders respectively given at any meeting, to make and carry out such contracts of consolidation, or lease, sale or other method of acquisition; *provided* that, in all consolidations, a copy of the agreement therefor shall be filed in the office of the Secretary of the Commonwealth of Virginia, and that any corporation with which said new corporation may consolidate, or which it may lease, shall be or remain subject to the jurisdiction of the courts of this State, and all lines of railroad operated by it in the State of Virginia shall be subject to the general laws of the State; and *provided, further,* that any stockholder who dissents from any such consolidation may within sixty days thereafter apply by petition to the Circuit Court of the City of Richmond to determine the value of his stock, and shall be entitled to receive from the new corporation the value as thus determined of such stock upon transfer thereof to the new corporation.

(*b*) It may from time to time purchase, own and hold bonds or other evidences of debt, and shares of the capital stock of any railroad company or companies formed under the laws of this or any other State, and from time to time may guarantee or assume the bonds, evidences of indebtedness or capital stock of any such railroad company.

(*c*) It may from time to time acquire or guarantee the stocks and bonds, or either, of any inland, coast or ocean transportation company or companies, operating to or from any point or points on its

lines; and it may develop or aid in the development of its business, by acquiring or guaranteeing the stocks and bonds, or either, of hotel, lighterage, wharf, elevating and other such enterprises convenient in connection therewith or as part thereof.

5. Said new corporation may issue its capital stock of one or more classes or kinds, and in one or more series or grades, with such preferences, conditions and voting power as shall be provided in said plan of organization, and, from time to time, it may increase or decrease the amount of any class or kind or grade of such stock as shall be provided in said plan of reorganization, or with the approval of a majority in amount of the stockholders, given at a meeting of stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued. The shares of each class of stock shall be of such par amount, and shall entitle the holders to such vote, respectively, as shall be determined in the said plan of reorganization, or by the stockholders in like manner.

6. Such new corporation may borrow money and issue bonds or other evidence of indebtedness therefor, and may secure the same, from time to time, by mortgage or deed of trust upon any or all of its property and franchises, and such new corporation, from time to time, may issue and sell its bonds and its capital stock at such prices and on such terms as shall be specified in said plan of organization, or as a majority in amount of the stockholders shall approve at any meeting, and may receive in payment therefor property, securities or shares in any corporation mentioned in this act, and any stock so issued shall be deemed fully paid and free from any liability.

7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five members, and one of their number shall be chosen as President. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-laws may be amended or repealed; provided, however, that until such by-laws shall be adopted by the stockholders the corporation shall be governed by by-laws adopted in accordance with the plan of organization.

8. The principal office of the Company shall be in the City of Richmond, in this State, at which all meetings of the stockholders shall be held; and all other offices and workshops of said Company shall be located in the State of Virginia, as far as the same may be practicable.

9. It shall be lawful for the Circuit Court of the City of Richmond, upon the petition of the President and Board of Directors, at any time to order a change in the name of the Company; but any such change of name shall be without prejudice to the rights of any creditor, or to the exercise of any of the powers and privileges granted by this act.

10. There shall be paid to the Clerk of the county or corporation in which any mortgage authorized by this act may be presented for recordation, the existing rate of taxation for such recordation upon

the assessed value of the road-beds, depots, station buildings and lots, and machine shops, fixtures and rolling stock, and any real estate not included in said enumeration, in the State of Virginia, conveyed in such mortgage; and upon presentation to the Clerk of the county or corporation where it is proposed to record said mortgage of a certificate of the Auditor of the State of the amount of the assessed values of the said property within the State of Virginia, and upon the payment of the tax thereon to the said Clerk, the said mortgage shall be recorded without other charge than the clerical fees pro-
31 vided in such cases. Certified copies of such mortgage may be recorded in any county of Virginia in which property covered by such mortgage may be located upon payment of clerical fees

11. All taxes and debts due or to become due the State of Virginia by the corporation shall be paid in lawful money of the United States, and not in coupons.

12. This act shall be in force from its passage.

A true copy.

Teste:

____ ____,

Clerk of the House of Delegates and Keeper of the Rolls of Virginia.

Date, ____.

32 Southern Railway Company.

Certificate.

STATE OF VIRGINIA, *City of Richmond, ss:*

Southern Railway Company, a corporation organized and existing under and pursuant to the provisions of an Act of Assembly of the State of Virginia, approved February 20, 1894 (of which act a copy, marked "Schedule D," is hereunto annexed and made a part of this certificate), entitled—

"An Act authorizing the purchasers of the Richmond and Dan-
"ville Railroad, their assigns and successors, to become and be a cor-
"poration, to adopt a name therefor, and to possess and exercise
"general powers; and authorizing the leasing to or by, and the con-
"solidation therewith of, other corporations,"

in conformity to the requirements of Section 3 of the said act, does hereby certify as follows, viz:

First. The said Southern Railway Company, upon June 18, 1894, did acquire title to the rights, property, privileges and franchises of the Richmond and Danville Railroad Company embraced in and covered by its consolidated mortgage to the Central Trust Company of New York, dated October 22, 1886, under and by means of the following sale and conveyance, viz:

(1) *The sale of the said mortgaged premises* was held in the City of Richmond, on the 15th day of June, 1894, under a decree of foreclosure and sale entered on the 13th day of April, 1894, in a certain

suit in equity pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company and others were complainants and the Richmond and Danville Railroad Company was defendant, it which suit it was sought to foreclose the said consolidated mortgage, and also to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of said the Richmond and Danville Railroad Company, at which sale the mortgaged premises were bid in by and struck off to Charles H. Coster and Anthony J. Thomas, a Purchasing Committee, as purchasers thereof, with the intent and for the purpose of vesting the same in the said Southern Railway Company thereafter to be organized by the said purchasers and their associates, pursuant to the laws of the State of Virginia.

(2) *The conveyance of the said mortgaged premises* was made, pursuant to the order of the Circuit Courts of the United States of America, by the Special Masters in said suit, Matthew F. Pleasants, Thomas S. Atkins and Charles Price, upon the 18th day of June, 1894, to the said Charles H. Coster and Anthony J. Thomas, as Purchasing Committee for the benefit of the said Southern Railway Company, such conveyance having been duly recorded on the said 18th day of June, 1894, in the Chancery Court of the City of Richmond, in the State of Virginia.

33 Second. *The plan of organization adopted by the purchasers* is that of which a copy is hereunto annexed, marked "Schedule B" and made a part of this certificate.

Third. *The amount and classes or kinds of capital stock* already authorized to be issued by the new corporation (subject to increase up to but not exceeding the limit prescribed by said act) were and are:

One million two hundred thousand shares of common stock, and six hundred thousand shares of preferred stock, each and every such shares being of the par value of one hundred dollars each, and the aggregate par value of such shares being one hundred and eighty million dollars.

The preferences, conditions and voting power of such capital stock are as set forth in the said plan of organization hereunto annexed, marked "Schedule B."

Fourth. *The amount and classes or kinds of mortgage bonds or other obligations heretofore* authorized to be issued by said corporation are bonds secured by mortgage payable as therein specified, and, except as and when registered as therein provided, being negotiable instruments, passing by delivery, free from any and all defences against the holder thereof, such bonds having been authorized to the amount of one hundred and twenty-four million five hundred thousand dollars, including what are known as its *"East Tennessee Reorganization Mortgage Bonds,"* for the aggregate amount of $4,500,000, and its *"First Consolidated Mortgage Gold Bonds,"* for the aggregate amount of $120,000,000, of which last-mentioned bonds a large part are not now to be issued, but are reserved for various purposes mentioned in the mortgage securing said bonds, dated October 2, 1894, and duly recorded November 9, 1894, in the office of the

Clerk of the Chancery Court of the City of Richmond, in the State of Virginia, and also in other offices; and among other purposes for the redemption and payment in due course of the bonds of the Richmond and Danville Railroad Company, secured by its two mortgages to Central Trust Company of New York, as Trustee, dated respectively October 5, 1874, and February 1, 1882, such last-mentioned mortgage having been amended by agreement dated July 24, 1891, between the said Central Trust Company and the said Southern Railway Company, a part of the mortgaged premises first above mentioned having been sold and purchased subject thereto, and such bonds have been and are assumed by the Southern Railway Company; and also for the payment and redemption in due course of the said "*East Tennessee Reorganization Mortgage Bonds;*" and also for the redemption and payment on July 1, 1909, of such of the first mortgage bonds of the Charlotte, Columbia and Augusta Railroad Company as shall have been extended in accordance with the provisions of an agreement made July 5, 1894, between the Southern Railway Company and the Maryland Trust Company, the holders of all such extended bonds then outstanding being entitled to exchange the same at par for like amount of the said First Consolidated Mortgage Bonds, interest to be adjusted properly at the time of every such exchange.

"Schedule A," hereunto annexed, is a list of the properties now embraced in the Southern Railway System, and is also a statement of bonds and obligations issued or assumed by or chargeable upon property purchased by Southern Railway Company under its said charter, "Schedule D," and showing the letter date of issue, number of bonds, amount of issue, rate of interest, and when and where payable; the only bonds issued directly by Southern Railway Company being those issued under the two mortgages first above mentioned, dated October 2, 1894.

Fifth. The name of the new corporation is "Southern Railway Company," and the name of its President is Samuel Spencer.

34 Sixth. The Directors of the new corporation are nine in number, and their names are:

Aubin L. Boulware, Richmond, Va.
Charles H. Coster, New York, N. Y.
Harris C. Fahnestock, New York, N. Y.
Thomas F. Ryan, do.
Samuel Spencer, do.
Anthony J. Thomas, do.
Samuel Thomas, do.
Skipwith Wilmer, Baltimore.
*J. Hood Wright, New York.

*A vacancy exists because of Mr. Wright's death, November 12, 1894.

In witness whereof, the said Southern Railway Company has executed this certificate under and by its common seal, attested by the signature of its President, this fourth day of December, 1894.

Attest:

[Seal of Southern Railway Company.]

SAMUEL SPENCER,
President of the Southern Railway Company.

W. A. C. EWEN, *Secretary.*

35 STATE OF NEW YORK, *City and County of New York, ss:*

I, George H. Corey, a Commissioner of Deeds for the State of New York, thereto duly appointed by the Governor of the State of Virginia, and a Notary Public for the said City and County of New York, thereto duly appointed by the Governor of the State of New York, do hereby certify that Samuel Spencer, whose name is signed to the foregoing and hereto annexed certificate bearing date the fourth day of December, 1894, as President of the Southern Railway Company, with whom I am personally acquainted, and who is personally known to me to be the President of the Southern Railway Company, the corporation described in and which executed the said certificate, personally appeared before me at my office in my said County and corporation, for himself and on behalf of the Southern Railway Company, and being informed of the contents of the said certificate, he did on this day acknowledge the due execution of the foregoing certificate on the day the same bears date; and further acknowledged that he voluntarily executed, signed and sealed the said certificate as his free act and deed, and as the free act and deed of the said Southern Railway Company, for the purposes and uses therein mentioned;

And the said Samuel Spencer, being by me first duly sworn did depose and say: That he resides in the City of New York, in the State of New York; that he is the President of the Southern Railway Company; that he knows the corporate seal of the said Company; that the seal affixed to the foregoing instrument is the corporate seal of the said Company, and was thereto affixed by authority of the Board of Directors of the said Company, and that he signed his name thereto by like authority as President of said Company.

In witness whereof, I have hereunto set my hand and seals of office as Commissioner of Deeds for the State of Virginia and as Notary Public for the City and County of New York, in the State of New York, at my office, this fourth day of December, 1894.

[Seal of George H. Corey, Commissioner for Virginia.]

GEO. H. COREY,
Commissioner for the State of Virginia in New York.

[Seal of George H. Corey, Notary Public, New York.]

GEO. H. COREY,
Notary Public for the City and County of New York in the State of New York.

STATE OF NEW YORK, *City and County of New York, ss:*

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court in said City and County, the same being a court of record do hereby certify that George H. Corey, whose name is subscribed to the certificate of acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same and to administer oaths; and, further, that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to the said certificate of acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 12th day of December, 1894.

[Seal of the Supreme Court, City and County of New York.]

HENRY D. PURROY, *Clerk.*

(*a*) LINES OF WHICH THE OWNERSHIP HAS BEEN ABSOLUTELY MERGED INTO THE SOUTHERN RAILWAY COMPANY (OR THE COMPANIES OF LIKE NAME IN KENTUCKY AND MISSISSIPPI) BY PURCHASE AT FORECLOSURE OF BY OTHER CONVEYANCE:

Richmond, York River & Chesapeake	about	39.	miles.
Richmond & Danville	"	145.53	"
Piedmont	"	48.	"
Washington, Ohio & Western	"	50.12	"
Western North Carolina	"	307.	"
Statesville & Western	"	20.36	"
Northwestern North Carolina	"	100.15	"
Clarksville & North Carolina	"	7.03	"
Oxford & Clarksville	"	49.32	"
Oxford & Henderson	"	12.94	"
Atlantic, Tennessee & Ohio	"	.44	"
Charlotte, Columbia & Augusta	"	190.53	"
Columbia & Greenville	"	164.98	"
Georgia Pacific	"	552.	"
East Tennessee, Virginia & Georgia	"	1,254.40	"
Louisville Southern	"	123.88	"
			3,109.24 miles.

(*b*) OPERATED LINES OF WHICH ALL OR NEARLY ALL THE STOCK IS OR IS EXPECTED TO BE OWNED BY SOUTHERN RAILWAY COMPANY:

Virginia Midland* and branches (leased)	about 400.70 miles.	
High Point, Randleman, Asheboro & Southern (all bonds also owned)*	" 27.81 "	
North Carolina Midland (all bonds also owned)*	" 26.11 "	
Elberton Air Line (all bonds also owned)*	" 50.36 "	
Roswell	" 9.11 "	
Yadkin*	" 41.17 "	
State University (no bonds issued)	" 10.20 "	
		565.46 miles.

37 (*c*) LEASED LINES:

North Carolina Railroad	about 223.20 miles.	
Atlanta & Charlotte	" 268.54 "	
		497.74 miles.

(*d*) LINES OPERATED UNDER VARIOUS ARRANGEMENTS:

Lawrenceville (all bonds and majority of stock owned, but line is of no value and has been discontinued)	9.61 miles	
Richmond & Mecklenburg (all second mortgage bonds and most of stock owned)	31.45 "	
Asheville & Spartanburg and Spartanburg, Union & Columbia (operated temporarily for account of first mortgage bondholders)	133.90 "	
		174.96 "
(*e*) KNOXVILLE & OHIO RAILROAD (nearly all the stock owned)		66.00 "
(*f*) BALTIMORE, CHESAPEAKE & RICHMOND STEAMBOAT LINE (all the stock and all certificates of debt owned)		200.00 "
Total mileage		about 4,607.40 miles.

* MEMO.—It is intended, later on, to bring about a conveyance of these lines to the Southern Railway Company.

(*g*) LINES OPERATED INDEPENDENTLY IN WHICH SOUTHERN RAILWAY COMPANY IS INTERESTED AS BONDHOLDER:

Danville & Western	about	70.	miles.
Chester and Lenoir, north end	"	33.	"
Blue Ridge (believed to be of no value)	"	34.02	"
Laurens do.	"	29.90	"
Milton & Southerlin do.	"	6.50	"
Hartwell	"	10.10	"
			183.52 miles.
Grand total			about 4,790.92 miles.

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"SCHEDULE A"—*Continued.*

SOUTHERN RAILWAY COMPANY.

Outstanding Mortgage and Obligations.

Principal and Interest payable, except as otherwise specified, in the City of New York.

Name of railroad company.	Description of bond or obligation.	Due.	Int.	Amount.
	A.			
	On properties merged into Southern Railway Company.			
Richmond & Danville	Consolidated gold 6 %	Jan., 1915	J. & J.	$5,997,000.00
do.	Debenture 5s (formerly 6s), earliest coupon April, 1896.	April, 1927	A. & O.	3,368,000.00
do.	Equipment S. F. gold 5 % (1)	Sept., 1909	M. & S.	1,194,000.00
do.	Equipment Notes	Various		507,835.00
Richmond, York River & Chesapeake	First Mortgage 5 %	Jan., 1910	J. & J.	400,000.00
do. do.	Second Mortgage 4½ %	Nov., 1910	M. & N.	500,000.00
Washington, Ohio & Western	First Mortgage 4 %	Feb., 1924	F. & A.	1,025,000.00
Atlantic, Tennessee & Ohio	First Mortgage 6 %	April, 1913	A. & O.	150,000.00
Western North Carolina	First Mortgage gold 6 %	July, 1914	J. & J.	2,531,000.00
Charlotte, Columbia & Augusta	First Mortgage gold 7 %, due January 1, 1895, extended at 5 % to July, 1909	July, 1909	J. & J.	2,000,000.00
do. do.	Second Mortgage 7 % earliest coupon October, 1895	Oct., 1910	A. & O.	500,000.00
Columbia & Greenville	First Mortgage, gold 5 % to January, 1898, 6 % thereafter.	Jan., 1916	J. & J.	2,000,000.00
Georgia Pacific	First Mortgage, gold 5 % to January, 1898, 6 % thereafter.	Jan., 1922	J. & J.	5,660,000.00
do.	Equipment S. F. gold	Various	F. & A.	787,000.00
do.	Equipment Notes	Various		359,005.54
East Tennessee, Virginia & Georgia	Divisional Mortgage 7 %	July, 1900	J. & J.	3,123,000.00
do. do.	Divisional Mortgage gold 5 %	July, 1930	J. & J.	3,106,000.00
do. do.	Consolidated gold 5 %	Nov., 1956	M. & N.	12,770,000.00
do. do.	Equipment Notes (including Louisville Southern)	Various		415,831.59
Alabama Central	First Mortgage gold 6 %	July, 1918	J. & J.	1,000,000.00
Southern Railway	East Tennessee Reorganization dated October 2, 1894, or old Equipment and Improvement bonds, gold 4 % to March, 1898, inclusive; 5 % thereafter	Mar., 1938	M. & S.	4,500,000.00

(1) Also payable in London, England.

Name of railroad company.	Name of bond.	Due.	Int.	Amount.
	B.			
	On properties practically owned by (*) or leased to (†) Southern Railway Company.			
*† Virginia Midland	Serials (1)	Various	M. & S.	$7,635,000.00
*† do.	General Mortgage 5 %	May 1936	M. & N.	4,859,000.00
*† Charlottesville & Rapidan	First Mortgage 6 % (2)	July, 1913	J. & J.	421,700.00
*† Franklin & Pittsylvania	First Mortgage 6 % (2)	July, 1913	J. & J.	79,000.00
† Atlanta & Charlotte Air Line	Preferred Mortgage 7 %	April, 1897	A. & O.	500,000.00
† do. do.	First Mortgage 7 %	Jan., 1907	J. & J.	4,250,000.00
† do. do.	Income 6 %	April, 1900	A. & O.	750,000.00
† do. do.	Stock 5-6 %		M. & S.	1,700,000.00
† North Carolina	Rental Equivalent to 6½ % on stock	Sept., 1901	J. & J.	4,000,000.00
* Knoxville & Ohio	First Mortgage gold 6 %	July 1, 1925	J. & J.	2,000,000.00
	C.			
	On all the property of the Southern Railway Company, including leaseholds, stocks and bonds.			
Southern Railway	First Consolidated Mortgage gold 5 % dated October 2, 1894—total issue $120,000,000 of which:	July, 1994	J. & J.	
	Reserve to take up foregoing bonds, stock, &c.	$78,088,372.13		
	do. for new construction and other purposes	30,000,000.00		
	To be issued now	21,911,627.87		21,911,627.87
	Total existing debt Southern Railway Company			$100,000,000.00

(1) Interest payable in Baltimore, Md.
(2) Interest payable in Philadelphia, Pa.
(3) Interest payable in Baltimore, Md.

40 "SCHEDULE B."

Southern Railway Company.

The purchasers of the railroad and other property of the Richmond and Danville Railroad Company, at the foreclosure sale thereof held in the City of Richmond on the 15th day of June, 1894—viz., Charles H. Coster and Anthony J. Thomas and their associates—constituting Southern Railway Company, a corporation organized and existing under the laws of the State of Virginia, and particularly an Act of Assembly of said State entitled—

"An Act authorizing the purchasers of the Richmond and Dan-
" ville Railroad, their assigns and successors, to become and be a cor-
" poration, to adopt a name therefor, and to possess and exercise
" general powers, and authorizing the leasing to or by, and the con-
" solidation therewith of, other corporations," approved February 20,
" 1894,

have adopted and adopt the following as

The Plan of Organization.

First. The said purchasers and the Southern Railway Company have accepted and do accept the before-mentioned Act of Assembly of the State of Virginia, and, anything herein contained or herefrom omitted to the contrary notwithstanding, they do reserve and retain the right from time to time and at all times to exercise and enjoy any and every right, power, privilege and franchise conferred in and by said Act of Assembly of the Commonwealth of Virginia approved February 20, 1894, or by any other act or law of which the Southern Railway Company may lawfully claim the benefit.

Second. The said purchasers and the Southern Railway Company have fixed the capital stock of the corporation at $180,000,000, divided into one million eight hundred thousand shares of the par value of $100 each, of which six hundred thousand shares are preferred stock and the remainder are common stock, reserving the right to increase such capital stock up to, but not exceeding, the limit authorized by the said Act of Assembly of the Commonwealth of Virginia approved February 20, 1894, and to increase or decrease the amount of any class or kind or grade of its capital stock, and also reserving any and all right to redeem and purchase at par any and all preferred stock, or any kind, class or grade thereof.

41 *The Preferred Stock is entitled to the following preferences, and to no other—viz:*

In each and every fiscal year after the first day of July, 1895, to receive non-cumulative dividends at and up to the rate of five per cent. per annum in preference and priority to the payment of any dividend on the Common Stock in such fiscal year, but only from the net profits of the Company as such shall be fixed and determined by the Board of Directors, and only when and as such Board shall

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declare dividends therefrom; but, notwithstanding the preference hereby declared, if, after providing for the payment of dividends for any fiscal year on the Preferred Stock outstanding in such year, there shall remain a surplus of net profits of such year, the Board of Directors may declare and pay dividends upon any other stock of the Company for such year out of such surplus net profits.

Such Preferred Stock is authorized to the amount of Sixty Million Dollars; and, without the consent of the holders of a majority of such Preferred Stock then outstanding, the Company can neither increase such authorized amount thereof nor put upon its property any mortgage to secure bonds for more than the aggregate principal sum of one hundred and twenty million dollars, in addition to prior liens thereon, assumed, extended or renewed, or any substitutions therefor, against which a like amount of bonds shall be reserved out of such amount of $120,000,000.

The conditions and voting power in respect of and belonging to all such stock are as follows:

With the exception of one thousand shares of common stock, heretofore issued or reserved to qualify Directors, or for other purposes, all of the stock of the Company—viz., 1,199,000 shares of common stock and 500,000 shares of preferred stock—have been duly issued and have been duly delivered to J. Pierpont Morgan, Charles Lanier and George F. Baker and their successors, as Voting Trustees, under an agreement dated October 15, 1894, with the exclusive right and privilege, in the said Voting Trustees during the continuance of their trust, as stated in said agreement, to vote upon and in respect of all such stock so issued to them, and also to collect and receive any dividends declared in respect of such stock, and to distribute any such dividends among the holders of their stock-trust certificates, which holders in due course will be entitled to receive in exchange therefor certificates for corresponding amounts and kinds of the capital stock of this Company then entitling them to one vote for each share thereof, and in the meantime to receive payments equal to the dividends, if any, collected by the Voting Trustees upon such number of such shares standing in the name of the Voting Trustees, who, until after the actual delivery of such stock certificates, shall possess and shall be entitled to exercise all rights of every name and nature, including the right at each and every corporate meeting or election to cast one vote for and in respect of each and every share of the capital stock of the Southern Railway Company on account of which such stock-trust certificates shall be issued, it being expressly stipulated that no voting right passes from the Company or from the Voting Trustees by, under or in respect of any such stock-trust certificate, or by or under any agreement expressed or implied.

Third. The prices and terms upon which the Southern Railway Company from time to time has issued and sold or shall issue and sell its bonds and its capital stock are those which heretofore have been or from time to time hereafter shall be approved by a majority in amount of the stockholders at their meetings, bonds to the aggre-

gate amount of $124,500,000 having been heretofore authorized for all purposes, including the payment of all prior liens.

Fourth. The By-Laws of the Southern Railway Company are those which, on the fifth day of July, 1894, were duly adopted by the Board of Directors of said Company at its first meeting, and
42 upon the same day adopted and ratified by the stockholders at their first meeting, subject to the amendments thereto from time to time adopted and to be adopted as therein provided, and the officers and duties of the officers of the Company shall be as provided by such By-Laws, a true copy of such By-Laws, as amended to this date, being hereunto annexed, marked "Schedule C," forming part of this plan of organization.

In witness whereof, the said purchasers—Chas. H. Coster and Anthony J. Thomas—have hereunto subscribed their names, and the Southern Railway Company has caused its common seal to be hereunto affixed and to be attested by the signature of its President this fourth day of December, 1894.

[Seal of Southern Railway Company.]

C. H. COSTER,
ANTHONY J. THOMAS,
SOUTHERN RAILWAY COMPANY,
By SAMUEL SPENCER, *President.*

43 STATE OF NEW YORK, *City and County of New York, ss:*

I, George H. Corey, a Commissioner of Deeds for the State of New York, thereto duly appointed by the Governor of the State of Virginia, and being also a Notary Public for the said City and County of New York, thereto duly appointed by the Governor of the State of New York, do hereby certify that Charles H. Coster and Anthony J. Thomas, whose names are signed to the writing hereto annexed, bearing date on the fourth day of December, 1894, have severally acknowledged the same before me in my State and corporation aforesaid.

And I do further certify that in my said State and corporation, on this fourth day of December, 1894, before me personally appeared Samuel Spencer, whose name is signed to the foregoing and hereto annexed Plan of Organization, bearing date the fourth day of December, 1894, as President of the Southern Railway Company, the corporation described in and which executed the said plan, and for himself and in behalf of the said Southern Railway Company, being informed of the contents of the said plan, did on this day acknowledge the due execution of the plan on the day the same bears date; and further acknowledged that he voluntarily executed, signed, sealed and delivered the said plan as his free act and deed, and as the free act and deed of the said Southern Railway Company, for the uses and purposes therein mentioned, and for the purposes therein contained:

And the said Samuel Spencer, being by me first duly sworn, did depose and say: That he resided in the City of New York; that he is President of the said Southern Railway Company; that he knows

the corporate seal of the said Company; that the seal affixed to the foregoing Plan is the corporate seal of the said Company, and was thereto affixed by authority of the Board of Directors of the said Company, and that he signed his name thereto by like authority as President of said Company.

In witness whereof, I have hereunto set my hand and seals of office as Commissioner of Deeds for the State of Virginia, and as Notary Public for the City and County of New York, at my office, this fourth day of December, 1894.

[Seal of George H. Corey, Commissioner for Virginia.]

GEORGE H. COREY,
Commissioner for the State of Virginia in New York.

[Seal of George H. Corey, Notary Public, New York.]

GEORGE H. COREY,
Notary Public for the City and County of New York, in the State of New York.

STATE OF NEW YORK, *City and County of New York, ss:*

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court in said City and County, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same and to administer oaths; and, further, that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to the said certificate of acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 12th day of December, 1894.

[Seal of the Supreme Court, City and County of New York.]

HENRY D. PURROY, *Clerk.*

44 "SCHEDULE C."

By-Laws of the Southern Railway Company, December 4, 1894.

Stockholders.

1. The annual meeting of the Stockholders, for the purpose of electing Directors, and for the purpose of transacting such other business as may come before the meeting, shall be held on the Tuesday preceding the last Tuesday in October of each year, at the office of the Company in the City of Richmond, Virginia, and notice thereof shall be given for two successive weeks in a newspaper published in the City of Richmond.

2. A general meeting of the Stockholders may be held at any time upon the call of the Board of Directors, or Stockholders holding together one-tenth of the capital stock, upon their giving notice of the time and place for such meeting for thirty days in one of the principal newspapers published in the City of Richmond, the City of Knoxville, Tennessee, and the City of New York.

3. To constitute a meeting of Stockholders, there must be present, either in person or by proxy, those who can give a majority of all the votes which could be given by all the Stockholders. If a sufficient number fail to attend at the time and place for the meeting, those who do attend may adjourn from time to time until a meeting shall be regularly constituted. A meeting of Stockholders may adjourn from time to time until their business is completed. No notice shall be necessary for the holding of an adjourned meeting.

4. At any meeting of the Stockholders each Stockholder may, in person or by proxy, duly appointed by instrument in writing subscribed by such Stockholder, duly attested, and filed with the Secretary at or before the meeting, give one vote on each share of stock held by him in the same right.

5. In order to effect an organization, the meeting shall be called to order by the President, or in his absence by the First, Second or Third Vice-Presidents, in the order named, and a Chairman shall be elected. In the absence of the President and all the Vice-Presidents, any Stockholder, or the duly appointed proxy of any Stockholder, may call the meeting to order. The polls shall be opened as soon as the organization of the meeting shall admit of, and shall be kept open for one hour, under the supervision of three Tellers, who shall have been previously appointed by the Board of Directors; or if not so appointed, or, if in case of appointment, all or any of them shall fail to act, appointments to fill the vacancies shall be made at such meeting by its Chairman. The votes for Directors, or for determining any other question as above provided, shall be by ballot, and each Stockholder shall be entitled to one vote for each share of stock held by him.

As soon as may be after the polls are closed, the Tellers shall make and subscribe, and report to the meeting, a certificate of the result of the election, which shall be entered at large on the records; and thereupon each person elected shall be notified by the Secretary of his election.

The Directors may be residents of any part of the United States. In case any person elected shall not, within thirty days after the date of the notice of his election, signify his acceptance, the Board of Directors may declare a vacancy to exist.

6. Certificates of stock, signed by the President or one of the Vice-Presidents and by the Secretary or Assistant Secretary, and sealed with the corporate seal of the Company, shall be issued to the Stockholders, subject to such rules and regulations as the Board of Directors may from time to time prescribe; and transfers of certificates shall be made only on the books of the Company, on the written order of the holder or his duly-appointed attorney, upon surrender of the original certificate. The transfer books shall be closed for at least ten days previous to, and on the day of, the annual

meeting, and at and for such other times as the Board of Directors shall order.

7. When a person to whom such a certificate is issued alleges it to have been lost, he shall file in the office of the Company, first, an affidavit setting forth the time, place and circumstances of the loss; second, proof of his having advertised the same, in a newspaper of general circulation published in the City of New York, once a week for two successive months; and, third, a bond to the Company with one or more sufficient sureties, with condition to indemnify all persons against any loss in consequence of issuing a new certificate in place of the former; and thereupon the Board of Directors may cause a new certificate to be issued.

8. For the convenience of security holders the Board of Directors may arrange for an agency in New York for the transfer of Stock and of Registered Bonds of the Company; proper records of such transfers to be kept at such agency, and to be open to the inspection of the Secretary.

Directors.

9. From and after the first annual meeting of the Stockholders the Board of Directors shall consist of nine members (of whom the President shall be one), who shall hold their office for one year, and until their successors are elected. Any vacancy in the Board may be filled by a majority of the Directors. A majority of the Board shall be a quorum for the transaction of business.

10. Regular meetings of the Board shall be held on the second Thursday of January, April, July and October, and special meetings of the Board may be called by order of the President or of the Executive Committee, or of a majority of the Board, and written notice of each meeting, whether regular or special, shall be delivered or mailed to each Director a reasonable time before the meeting. All such meetings shall be held either in Richmond, Knoxville, or in New York City.

11. The Directors elected at the annual meeting shall meet as soon as may be thereafter, and they shall elect a President, a First Vice-President, a Second Vice-President and a Third Vice-President of the Company, each to hold office for one year, or until the
46 next election of the Directors, and until his successor is elected; and they shall also elect, to hold office during the pleasure of the Board, a General Counsel, a Secretary and Treasurer, and they may also elect or appoint an Auditor. The President shall be elected from among the members of the Board.

12. The order of business at all meetings of the Board, except adjourned meetings, shall be as follows:

1st. Reading the Minutes of the last meeting.
2nd. Correspondence.
3rd. Reports of Officers.
4th. Reports of Standing Committees.
5th. Reports of Special Committees.
6th. Unfinished Business.
7th. Original Resolutions and New Business.

13. In case a vacancy shall have occurred in the office of the President, First, Second or Third Vice-President, Secretary or Assistant Secretary, Treasurer or Assistant Treasurer, or Auditor, the Board of Directors shall fill the same as early as practicable, and until so filled the President, or in his absence the First, Second or Third Vice-President, in the order named, may make an appointemnt *pro tem.*, to fill the vacancy temporarily; or in case of temporary incapacity or absence of any officer, other than the President or First, Second or Third Vice-President, the President, or in his absence the First or Second Vice-President, in the order named, may make an appointment *pro tem.*, to act in place of the officer so temporarily incapacitated or absent, but such appointment shall be subject to change by the Board or Executive Committee at any regular or special meeting thereafter.

14. The compensation of all officers of the Company shall be fixed by the Board of Directors from time to time. Each Director shall be paid ten dollars for each meeting of the Board, and of any committee of which he is a member, at which he shall attend, in addition to transportation and other expenses actually incurred, at the rate of not exceeding four cents per mile to and from his place of residence to the place of meeting.

15. The Board of Directors shall make a report to the Stockholders at their annual meeting.

The Corporate Seal.

16. The Common Corporate Seal is, and until otherwise ordered by the Board of Directors shall be, an impression upon paper or wax of a circular device, such as that impressed upon the margin hereof, being an ornamental center surrounded by the words *"Southern Railway Company, June, 1894,"* within, containing circumferential lines.

The Secretary of the Company shall procure, preserve and keep duplicate stamps suitable to make such impression of such corporate seal; and, when and as directed by the special or general resolution of the Board of Directors or of the Executive Committee, the President, either of the three Vice-Presidents or the Secretary or Assistant Secretary, may and shall use one or the other of such duplicate stamps in impressing such corporate seal upon the documents, indentures and obligations of the Company.

47

President and Vice-Presidents.

17. The President shall preside at all meetings of the Stockholders and of the Directors. In his absence the First Vice-President, Second Vice-President or Third Vice-President, in the order named, shall preside. In the absence of the President and the First, Second and Third Vice-Presidents, the members present shall appoint one of their number to preside. The President shall have general charge, control and supervision of all the business and affairs of the Company, and over all its officers, agents and employees. Except when these By-Laws otherwise provide, or the Board shall otherwise

direct, all officers and heads of departments of the Company shall be appointed by him and subject to removal by him.

18. The First Vice-President shall, during the absence or inability of the President, perform his duties. During the absence or inability of the President and First Vice-President the Second Vice-President shall perform his duties, and during the absence or inability of the President and First and Second Vice-Presidents the Third Vice-President shall perform his duties. The Vice-Presidents shall also perform such other duties as may from time to time be assigned to them respectively by the President or by the Board.

19. All deeds of conveyance of the Company's lands, and all other instruments required to be executed by the Company itself, under its corporate seal, shall be signed by the President (or First, Second or Third Vice-President) for and in the name of the Company, except in such cases as the Board of Directors shall otherwise order; and the seal of the Company shall be thereto affixed by the President (or First, Second or Third Vice-President) or by the Secretary or Assistant Secretary, and attested by the Secretary or Assistant Secretary, and the execution thereof shall be acknowledged by the President (or First, Second or Third Vice-President) or other person designated by the Board to execute the same, as the act and deed of the Company, in such manner and form as may be required by law.

Other Executive Officers.

20. The Board of Directors shall have power to elect or appoint any other officers or assistants, who shall perform such duties as may be assigned to them by the Board by general rules, or from time to time; and who shall hold their office during the pleasure of the Board.

Committees.

21. There shall be an Executive Committee, consisting of four members of the Board, of whom the President shall be one. Other Committees, standing or special, may be appointed with such duties and powers as shall be assigned to and given them by the Board. Meetings of the Executive Committee may be called by order of the President, or of a majority of said Committee to be held at such convenient place or places as he or they shall appoint, on written notice delivered or mailed to each member thereof a reasonable time before the meeting, and three members shall constitute a quorum.

In case of the anticipated absence of any member of the Executive Committee from any meeting of said Committee, or in case of inability of any member to attend such meeting, the President (or First, Second or Third Vice-President, in the order named, in his absence) may, at any time before such meeting is called to order, appoint a Director to serve during such absence or inability in place of the absent member or of the member unable to attend, but such
48 appointment shall not extend to more than one member absent or unable to attend, and any member of the Committee present at any meeting may object to such appointee before the meeting is called to order, in which case the appointment shall be void

and of no effect. No Vice-President shall be a member of the Executive Committee.

22. The Executive Committee, when the Board is not in session, shall have and may exercise, but only by the unanimous vote of all the members present at a meeting, all the powers of the Board of Directors; and they shall cause to be kept a full and accurate record of all the actions and proceedings, and report the same from time to time to the Board.

23. The said Committee shall have charge of all questions of finance, accounts and claims. It shall be the duty of this Committee, from time to time, at their discretion, and whenever directed by the Board, to audit and pass upon the accounts of the Treasurer, and to examine the transfer books of the Company; they shall report to the Board at every regular meeting, and at any special meeting, as occasion shall require.

24. All reports of Committees, standing or special, shall be made to the Board in writing, signed by the Chairman or by the member designated by the Committee to make the report.

25. All Committees shall be appointed by the President, unless it be otherwise directed by the Board. A majority of the members of all Committees shall be a quorum, except as limited in article twenty-one.

The General Counsel.

26. The General Counsel, subject to the President and the Board of Directors, shall have general charge and supervision of the legal business of the Company.

The Secretary.

27. It shall be the duty of the Secretary to attend all meetings of the Board of Directors and of the Stockholders, and of the Executive Committee, and record the minutes of their proceedings in suitable books to be provided for that purpose, and of which he shall be the custodian. He shall give due and timely notice to the Directors of all regular and special meetings of the Board, and of meetings of Committees to the members thereof. He shall take charge of all reports, resolutions and papers, after they shall be acted upon or submitted to the Board, and also of all letters and papers pertaining to the general business of the Company, except the official bonds. He shall be the custodian of the seal of the Company, and it shall be his duty to affix the same to all such proper instruments as the Board or the President, or either Vice-President, may direct, or to allow the President or either Vice-President so to affix it. The Directors may, if they think proper, appoint an Assistant Secretary, who shall have his office in Richmond, and perform or assist in the performance of such of the above duties as they may prescribe.

28. The Stock Books shall be kept by the Secretary, and he shall also keep transfer books, on which he shall register all transfers of stock and of registered bonds, and the names and addresses of all the transferees, unless the Board of Directors should arrange for a

transfer agency in New York, in which case the said stock books and other books in this section provided for shall be kept there, subject to the supervision of the Secretary.

49 The Treasurer.

29. The Treasurer shall have his office in Richmond. It shall be his duty, either in person or through competent and faithful assistants, cashiers or disbursing officers, to receive and disburse, under the direction of the Board, all moneys belonging or coming to the Company; to keep regular, full and true accounts of all receipts and disbursements, and to make detailed reports of the same to the Board of Directors at the regular meetings and at all other times when required.

30. The moneys and securities of the Company shall be kept in such bank or banks, or other depository or depositories, as the Executive Committee or the Board may from time to time direct.

31. No payment shall be made except upon a sufficient voucher duly certified or approved by the proper officer.

32. The Treasurer and all other officers and agents who shall receive or disburse moneys, or have custody of moneys or securities, shall give bonds, with sureties approved by the Board or by the Executive Committee, for the faithful discharge of their duties, and for the safe keeping and due delivery of the moneys, securities and other property of the Company committed to them or that shall come to their hands.

33. The Directors may, if they think proper, appoint an Assistant Treasurer, who shall have his office at such place as they may direct, and perform or assist in the performance of such of the above duties as they may prescribe.

Auditor.

34. The Auditor shall have direct charge of the general books and accounts of the Company; and it shall be his duty and he shall have power to enforce the system prescribed for keeping the same. He shall, on approval of the President or in his absence, of either of the three Vice-Presidents, prescribe the form of all payrolls, vouchers, accounts, reports and returns of every description required in his department, and also the time at which the same shall be rendered. It shall be his duty to examine the accounts of all officers and employees and to see that the proper returns are made of all receipts from traffic and other sources, and that correct vouchers are turned over to him for all disbursements for any purpose. There shall be returned to the Auditor, at such time in every month as he may prescribe, all bills and payrolls for the previous month, properly certified and made in detail. The auditor shall approve and audit the same if found correct in every particular. But he shall not approve or audit any voucher or payroll unless it has been previously certified to by the head of the department in which it originated; and this approval will not be held to relieve him from the duty of exercising due caution and diligence in satisfying himself that the voucher or payroll is correct and duly authorized. And in case of doubt it

shall be his duty to refer it back to the officer certifying the same; and if the information furnished is not satisfactory, he shall refer it to the President, or, in his absence to either Vice-President. He shall also be the custodian of all bonds of officials and agents of the company handling funds. The auditor shall have the right to appoint and remove all necessary assistants or clerks in his department, subject to the approval of the President, or in his absence, of either Vice-President, and he shall be held responsible for the proper performance of their duties.

50 Amendments.

35. These By-Laws may be altered, amended, added to or repealed at any regular meeting of the Board of Directors by a vote of two-thirds of all Directors present, provided such two-thirds constitute a majority of all the Directors of the Company, and provided written or printed notice of the proposed alteration, amendment, addition or repeal shall have been given at a previous regular meeting or they may be altered, amended or added to or repealed, in like manner at any regular or special meeting, of which written or printed notice, stating the object of the meeting as above shall have been given or sent to each Director at least ten days previous to the time appointed for such special meeting; or they may be amended at any annual or general meeting of the stockholders by a vote of a majority in amount of all the shares.

51 "Schedule D."

An Act

Authorizing the Purchasers of the Richmond and Danville Railroad, Their Assigns and Successors, to Become and be a Corporation, to Adopt a Name Therefor, and to Possess and Exercise General Powers; and Authorizing the Leasing to or by, and the Consolidation Therewith of, Other Corporations.

[Approved February 20, 1894.]

Whereas, a certain suit in equity is now pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company of New York is complainant, and the Richmond and Danville Railroad Company, a corporation created by and existing under the Laws of the State of Virginia, is defendant, in which suit it is sought to foreclose the consolidated mortgage, dated the twenty-second day of October, in the year one thousand eight hundred and eighty-six, and upon or about that day duly executed, acknowledged and delivered by said railroad corporation to said Central Trust Company of New York, and subsequently supplemented and confirmed by said railroad corporation by instruments dated November first, eighteen hundred and eighty-six, and April thirtieth, eighteen hundred and eighty-

eight, respectively, in which suit also it is proposed to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said Richmond and Danville Railroad Company;

And, whereas, it is deemed desirable and for the interest of this Commonwealth that the said railroad property shall be sold and reorganized in such manner and under such conditions as to secure the largest and best possible facilities and advantages of transportation and communication for the people of this State; now, therefore;

1. *Be it enacted by the General Assembly of Virginia*, that the purchaser or purchasers of the said mortgaged premises of the said the Richmond and Danville Railroad Company at the foreclosure sale thereof in the course of the said suit in equity, and such person or persons as he or they may associate with himself or themselves, shall forthwith be, and they hereby are, constituted a body politic and corporate by the name which they may select, as set forth in the conveyance of said mortgaged premises, or in any writing signed by him or them and recorded in the court in which the said conveyance shall be recorded, and such new corporation shall have, possess and be invested with all the estate, right, title and interest in and to such railroad and other property, with their appurtenances, and all the franchises, rights and privileges had and possessed by the said Richmond and Danville Railroad Company to the same extent as a purchaser under sections twelve hundred and thirty-three and twelve hundred and thirty-four of the Code of Virginia, and shall perform all the duties prescribed by said sections of said Code; provided, however, that said new corporation shall not be limited as to the amount of classification of its stock or bonds, except that the
52 total amount of stock issued shall not exceed three hundred and fifty million dollars, and shall have no immunity from any lawful State, county or municipal taxation by reason of its former charter or any law heretofore exempting it from taxation.

2. Such purchaser or purchasers may associate with him or them any number of persons in the organization of the new corporation, which may create and issue its stock and its bonds secured by mortgage or otherwise, according to any plan adopted by such purchaser or purchasers, and filed as hereinafter provided.

3. It shall be the duty of such new corporation within six months after the conveyance to it of said mortgage premises to execute a certificate in writing under its common seal attested by the signature of its President or Vice-President, referring to the sale and conveyance by which it shall have acquired title to such premises and the plan of organization adopted by the purchasers, the amount and classes or kinds of capital stock and mortgage bonds or other obligations authorized to be issued, and also specifying the name of such new corporation and of its President, and the number and names of its Directors, which certificate shall be filed in the office of the Secretary of the Commonwealth of Virginia, and a certified copy thereof shall be conclusive evidence of the existence of such new corporation.

4. In addition to its other powers, such new corporation shall have,

and from time to time as occasion arises may exercise, the following powers, or any of them, namely:

(*a*) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase or otherwise acquire, or be leased, used, operated by, or consolidated with, any railroad or transportation company now or hereafter incorporated by the laws of the United States, or of any of the States thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies which now are or hereafter may be leased, or used, or operated by, or consolidated with any one or more of such railroad or transportation companies; and, from time to time, it may consolidate its capital stock, property and franchises, by change of name or otherwise, with the capital stock, property and franchises of any other railroad or transportation company, power being hereby granted to any railroad or transportation company or companies incorporated by or under any act or acts of the General Assembly of the State of Virginia, with the approval of a majority in amount of its or their shareholders respectively given at a meeting, to make and carry out such contracts of consolidation or lease, sale or other method of acquisition; *provided* that, in all consolidations, a copy of the agreement therefor shall be filed in the office of the Secretary of the Commonwealth of Virginia, and that any corporation with which said new corporation may consolidate, or which it may lease, shall be or remain subject to the jurisdiction of the courts of this State, and all lines of railroad operated by it in the State of Virginia shall be subject to the general laws of the State; and *provided, further*, that any stockholder who dissents from any such consolidation may within sixty days thereafter apply by petition to the Circuit Court of the City of Richmond to determine the value of his stock, and shall be entitled to receive from the new corporation the value as thus determined of such stock upon transfer thereof to the new corporation.

(*b*) It may from time to time purchase, own and hold bonds or other evidences of debt, and shares of the capital stock of any railroad company or companies formed under the laws of this or any other State, and from time to time may guarantee or assume the bonds, evidences of indebtedness or capital stock of any such railroad company.

53 (*c*) It may from time to time acquire or guarantee the stocks and bonds, or either, of any inland, coast or ocean transportation company or companies, operating to or from any point or points on its lines; and it may develop or aid in the development of its business by acquiring or guaranteeing the stocks and bonds, or either, of hotel, lighterage, wharf, elevating and other such enterprises convenient in connection therewith or as part thereof.

5. Said new corporation may issue its capital stock of one or more classes or kinds, and in one or more series or grades, with such preferences, conditions and voting power as shall be provided in said plan of organization, and from time to time it may increase or de-

crease the amount of any class or kind or grade of such stock as shall be provided in said plan of reorganization, or with the approval of a majority in amount of the stockholders, given at a meeting of stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued. The shares of each class of stock shall be of such par amount, and shall entitle the holders to such vote respectively as shall be determined in the said plan of reorganization or by the stockholders in like manner.

6. Such new corporation may borrow money and issue bonds or other evidence of indebtedness therefor, and may secure the same, from time to time, by mortgage or deed of trust upon any or all of its property and franchises, and such new corporation, from time to time, may issue and sell its bonds and its capital stock at such prices and on such terms as shall be specified in said plan of organization, or as a majority in amount of the stockholders shall approve at any meeting, and may receive in payment therefor property, securities or shares in any corporation mentioned in this act, and any stock so issued shall be deemed fully paid and free from any liability.

7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five members, and one of their number shall be chosen as President. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-laws may be amended or repealed; provided, however, that until such by-laws shall be adopted by the stockholders the corporation shall be governed by by-laws adopted in accordance with the plan of organization.

8. The principal office of the Company shall be in the City of Richmond, in this State, at which all meetings of the stockholders shall be held; and all other offices and workshops of said Company shall be located in the State of Virginia, as far as the same may be practicable.

9. It shall be lawful for the Circuit Court of the City of Richmond, upon the petition of the President and Board of Directors, at any time to order a change in the name of the Company; but any such change of name shall be without prejudice to the rights of any creditor, or to the exercise of any of the powers and privileges granted by this act.

10. There shall be paid to the Clerk of the county or corporation in which any mortgage authorized by this act may be presented for recordation, the existing rate of taxation for such recordation upon the assessed value of the road-beds, depots, station buildings and lots, and machine shops, fixtures and rolling stock, and any real estate not included in said enumeration, in the State of Virginia, conveyed in such mortgage; and upon presentation to the Clerk of the county or corporation where it is proposed to record said mortgage of a certificate of the Auditor of the State of the amount of the assessed values of the said property within the State of Virginia, and upon the payment of the tax thereon to the said Clerk, the said mortgage

54 shall be recorded without other charge than the clerical fees provided in such cases. Certified copies of such mortgage may be recorded in any county of Virginia in which property covered by such mortgage may be located upon payment of clerical fees.

11. All taxes and debts due or to become due the State of Virginia by the corporation shall be paid in lawful money of the United States and not in coupons.

12. This act shall be in force from its passage.

February 28, 1904.

(A Copy.)

(Signed) J. BELL BIGGER,

Clerk of the House of Delegates and Keeper of the Rolls of Virginia.

COMMONWEALTH OF VIRGINIA:

I, Chas. T. O'Ferrall, Governor of the Commonwealth of Virginia, certify that J. Bell Bigger, whose name is signed to the within copy of an Act of Assembly bearing date the 28th day of February, 1894, is and was at the time of signing Clerk of the House of Delegates and Keeper of the Rolls of Virginia, duly elected and qualified; that he is authorized by the laws of this State to make and sign such copy of an act, and that to all his official acts full faith, credit and authority are due and ought to be given.

In testimony whereof, I have hereunto set my hand as Governor, and caused the Great Seal of the State of to affixed. Done at the City of Richmond this 28th day of February, A. D. 1894, and in the one hundred and eighteenth year of the Commonwealth.

[GREAT SEAL OF VIRGINIA.]

(Signed) CHAS. T. O'FERRALL.

By the Governor:

(Signed) J. T. LAWLESS,

Secretary of the Commonwealth and Keeper of the Seals.

OFFICE OF THE SECRETARY OF THE
COMMONWEALTH AND KEEPER OF
THE SEALS OF VIRGINIA.

RICHMOND, VIRGINIA, ——— —, ———.

COMMONWEALTH OF VIRGINIA:

I, ——— ———, Secretary of the Commonwealth of Virginia, certify that the foregoing is a true copy of the certificate of the Southern Railway Company, a corporation created by and existing under an Act of Assembly of the State of Virginia, approved February 20, 1894, as mentioned in Section 3 of said Act, which certificate was duly filed in my said office on the 14th day of December, 1894.

Given under my hand and the lesser seal of the Commonwealth, at Richmond, this — day of ———, A. D. ———.

[SEAL.]

——— ———,

Secretary of the Commonwealth and Keeper of the Seals of Virginia.

49

55 AN ACT

To Provide for the Reduction of the Capital Stock and the Issue of Special Stock of the Southern Railway Company.

Approved January 23, 1900.

Whereas, pursuant to the provisions of the Act of Assembly of the Commonwealth of Virginia, approved February twentieth, eighteen hundred and ninety-four, the purchasers of the Richmond and Danville Railroad did constitute themselves a body politic and corporate by the name of

Southern Railway Company;

and also as provided by said Act, within six months after making their purchase did adopt and did file in the office of the Secretary of the Commonwealth their certain plan of organization dated December fourth, eighteen hundred and ninety-four, whereby, among other things, they did certify that the said purchasers and the Southern Railway Company had fixed the capital stock of the corporation at one hundred and eighty million dollars, divided into one million eight hundred thousand shares, each of the par value of one hundred dollars, of which six hundred thousand shares are preferred stock and the remainder are common stock, the corporation reserving the right to increase such capital stock up to, but not exceeding the limit authorized by the said act, approved February twentieth, eighteen hundred and ninety-four, and the right to increase or to decrease the amount of any class or kind or grade of its capital stock, and also to redeem and to purchase at par any and all preferred stock, or any kind, class or grade thereof; and further did certify that with the exception of one thousand shares of common stock theretofore issued or reserved to qualify Directors, or for other purposes, all of the stock of the Company had been duly issued and delivered to J. Pierpont Morgan, Charles Lanier and George F. Baker, and their successors, as Voting Trustees, under an agreement dated October fifteenth, eighteen hundred and ninety-four, with the exclusive right and privilege in said Voting Trustees, during the continuance of their trust as provided in said agreement, to vote upon and in respect of, all stock so issued to them, and also to collect and receive all dividends declared in respect of such stock, and to distribute any such dividends among the holders of their stock trust certificates, which holders in due course would be entitled to receive in exchange therefor certificates for corresponding amounts and kinds of the capital stock of the Southern Railway Company; and

Whereas, from time to time, the said corporation has issued stock certificates for the full amount of one million eight hundred thousand shares, each of the par value of one hundred dollars of which six hundred thousand shares are preferred stock, and one million two hundred thousand shares are common stock, all of which stock certificates (excepting those for such one thousand shares of common stock) have been duly issued to, and now are held by, the

said Voting Trustees under the said Voting Trust Agreement dated October fifteenth, eighteen hundred and ninety-four; and

Whereas, in and by Section five of the said Act, approved February twentieth, eighteen hundred and ninety-four, it was provided that the said new company might issue its capital stock of one or more class or kinds and in one or more series or grades, with such preferences, conditions, and voting power as should be provided in said plan of organization; and from time to time might increase or decrease the amount of any class or kind or grade of such
56 stock as should be provided in the plan of organization, or with the approval of a majority in amount of the stockholders given at a meeting of the stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued; and that the shares of each class of stock should be of such par amount, and should entitle the holders to such vote, respectively, as should be determined by said plan of organization, or by the stockholders in like manner; and

Whereas, no express provision concerning any increase or decrease of the common capital stock is contained in any outstanding certificate representing common stock, and it is deemed desirable for the interests of the Company and of the Commonwealth that the nominal value of such common stock shall be reduced so as to conform more nearly to the market value thereof; *now, therefore,*

1. *Be it enacted by the General Assembly of Virginia:* That in the manner hereinafter provided, with the consent of holders of a majority of all outstanding stock of the Southern Railway Company, including at least a majority of outstanding common stock, the Board of Directors of the Company, from time to time in *reduction* of the amount of its stock, may issue one share of a new or special stock as hereinafter described, in lieu and instead of the issue of two shares of the stock authorized by said Act approved February twentieth, eighteen hundred and ninety-four, but not heretofore issued, or in exchange for every two shares of the common stock now outstanding that may be surrendered for that purpose and cancelled. The company may agree to pay a dividend or other cash sum in connection with such exchanges of outstanding common stock; the amount of such dividend or other cash sum to be fixed by the Board of Directors, and payment thereof to be made at such time and in such manner as in its discretion the board may determine. The consent hereunder of stockholders may be given either in writing or by vote at a meeting or by a combination of consents in writing or by vote.

2. Holders of stock trust certificates may authorize the Voting Trustees as holders of the corresponding amount of stock to consent to such reduction, and may confer any other authority upon the Voting Trustees by presentation of such certificates to the Voting Trustees, in order that a notation of such authority may be stamped thereon. Such stamp on any stock trust certificate shall be conclusive proof that the holder thereof has given such authority, which shall bind all transferees of such certificate and of any interest thereby represented, and shall be irrevocable. In exchange

for stock trust certificates stamped as aforesaid there shall be issued stock trust certificates either in the present form similarly stamped or in a new form adapted to the conditions as altered under this Act.

3. If and when the holders of a majority of the outstanding stock, including such amount of the outstanding common stock (not less than a majority thereof) as shall be satisfactory to the Board of Directors, shall have consented to the reduction herein authorized, the company from time to time within such period or periods as shall be prescribed or extended by the Board of Directors, shall issue a new certificate for one share (of the par value of one hundred dollars) of the special stock authorized by this Act in exchange for every two shares of outstanding common stock surrendered for that purpose; and as hereinbefore authorized, thereupon shall make payment of such dividend or other cash sum, if any, as it may have agreed to pay.

4. All such special stock, whether issued as herein permitted in lieu of authorized common stock, or in exchange for outstanding common stock, shall be distinguished by printing on or in the certificates to be issued therefor, a statement that such stock was
57 issued under the provisions of this Act. Until more than ninety-five per centum of the common stock then outstanding shall have been exchanged as herein permitted, and thereafter until otherwise determined by the Board of Directors, each share of such special stock shall entitle the holder thereof to receive the same dividends as though he were the holder of two shares of present common stock theretofore converted into such one share of special stock.

5. From time to time, in exchange for such amount of special stock as under this Act shall be issuable therefor the Voting Trustees may surrender to the company certificates for present common stock to the amount which by stamping or otherwise shall have been authorized by the holders of common stock trust certificates; and at the termination of the voting trust the holders of such stamped common stock trust certificates shall receive from the Voting Trustees, in lieu of the common stock so surrendered to the company and mentioned in such trust certificates special stock to the extent of one-half of such amount of such common stock. Any dividend or other cash sum that may be received by the Voting Trustees in connection with such exchanges of common stock shall be payable by them to the holders of the stamped common stock trust certificates at such time or times as the Voting Trustees may determine. After the termination of the voting trust, the Voting Trustees and the Board of Directors, upon such terms as they may deem expedient, may make arrangements for the issue of special stock in redemption of unstamped common stock trust certificates then outstanding.

6. Nothing in this Act contained shall impair the existing and continuing right of the Southern Railway Company to increase or to decrease its capital stock of any class or grade, whether preferred, special or common, under and in accordance with said Act of Assembly, approved February twentieth, eighteen hundred and ninety-four. With the approval of the holders of a majority of the capital stock, given at a meeting of the stockholders called for that purpose

after the termination of the voting trust, the company may decrease the amount of its common stock to one-half the amount thereof by reducing the number of shares of common stock of one hundred dollars each then held by each stockholder to one-half of such number.

7. This Act shall be in force from its passage.

A true Copy.

Teste:

——— ———,
Clerk of the House of Delegates and
Keeper of the Rolls of Virginia.

Date ———.

58 AN ACT

To Amend and Re-enact Section 7 of an Act Approved February 20, 1894, Entitled "An Act Authorizing the Purchasers of the Richmond and Danville Railroad, Their Assigns and Successors, to Become and be a Corporation, to Adopt a Name Therefor, and to Possess and Exercise General Powers; and Authorizing the Leasing to or by, and the Consolidation Therewith of, Other Corporations."

Approved February 26, 1902.

1. *Be it enacted by the General Assembly of Virginia:* That Section Seven of an Act, approved February twentieth, eighteen hundred and ninety-four, entitled "An Act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers; and authorizing the leasing to or by, and the consolidation therewith of, other corporations," be and hereby is amended and re-enacted to read as follows:

§7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five nor more than fifteen members, and one of their number shall be chosen as President. The corporation, at a general meeting or at an annual meeting, may from time to time increase or decrease, within the limits hereinbefore fixed, the number of Directors to be elected at the next annual meeting, but in case of such increase or decrease, the number to be elected shall be specified in the notice of the meeting at which the election is to be held. By the vote of a majority of the stockholders present or represented at any general meeting or at any annual meeting, the corporation may classify its Directors into three classes, as nearly as may be equal in numbers. In case such classification is made, the term of office of the Directors of the first class shall expire in one year, of the Directors of the second class in two years, of the Directors of the third class in three years, from the annual meeting at which the first Directors so classified are chosen under this Act and at each annual meeting thereafter, the Directors then to be elected shall be elected for three years. Every Director shall continue in office until the expiration of the term for which he was elected, and until his successor shall have been elected and shall have accepted his office.

All vacancies shall be filled and all Directors for whose election provision is not otherwise made in this Act, shall be elected in accordance with the by-laws. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its Directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-laws may be amended and repealed, provided, however, that until otherwise voted by the stockholders, the corporation shall be governed by the by-laws of the Southern Railway Company, adopted in accordance with the plan of organization of the Southern Railway Company filed in the office of the Secretary of the Commonwealth, dated December the fourth, eighteen hundred and ninety-four.

2. All acts and parts of acts inconsistent herewith are hereby repealed.

3. This Act shall be in force from its passage.

A true Copy.

Teste:

—— ——,

Clerk of the House of Delegates and
Keeper of the Rolls of Virginia.

Date ——.

59 COMMONWEALTH OF VIRGINIA:

I, —— ——, Governor of the Commonwealth of Virginia, certify that —— ——, whose name is signed to the within copies of Acts of Assembly of Virginia, approved, respectively, February 20, 1894, January 23, 1900, and February 26, 1902, bearing date the — day of ——, ——, is, and was, at the time of such signing, Clerk of the House of Delegates and Keeper of the Rolls of Virginia, duly elected and qualified; that he is authorized by the laws of this State to make and sign such copies of Acts of Assembly of Virginia; that such attestation is in due form and by the proper officer, and that to all his official acts full faith, credit and authority are due and ought to be given.

And I further certify that —— ——, whose name is signed to the within attestation of the Certificate of Southern Railway Company mentioned in Section 3, of the Act of Assembly of Virginia, approved February 20, 1894, bearing date the — day of ——, is, and was, at the time of such signing, Secretary of the Commonwealth of Virginia, duly elected and qualified; that he is the keeper of the records in which said certificate is recorded, and that he is authorized by the laws of this State to make and sign such attestation; that such attestation is in due form and by the proper officer, and that to all his official acts full faith, credit and authority are due and ought to be given.

In Testimony Whereof, I have hereunto set my hand as Governor, and caused the Great Seal of the Commonwealth to be affixed.

Done at the City of Richmond, this — day of ——, in the year of our Lord —— and in the —— year of the Commonwealth.

By the Governor:

—— ——,

Secretary of the Commonwealth and
Keeper of the Seals.

60 EXHIBIT B.

SEC. 155, *State Corporation Commission; how appointed; term of office; how vacancies filled; who ineligible; qualifications of at least one member; how removed or impeached; officers, how elected; rules of order and procedure; general provisions; salaries; election of members after January 1, 1908; how vacancies then filled.*

A permanent commission, to consist of three members, is hereby created, which shall be known as the State Corporation Commission. The commissioners shall be appointed by the Governor, subject to confirmation by the General Assembly in joint session, and their regular terms of office shall be six years, respectively, except those first appointed under this Constitution, of whom, one shall be appointed to hold office until the first day of February, nineteen hundred and four; one, until the first day of February, nineteen hundred and six, and one, until the first day of February, nineteen hundred and eight. Whenever a vacancy in the commission shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term, subject to confirmation by the General Assembly as aforesaid. Commissioners appointed for regular terms shall, at the beginning of the terms for which appointed, and those appointed to fill vacancies shall, immediately upon their appointments enter upon the duties of their office; but no person so appointed, either for a regular term, or to fill a vacancy, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment or adjourn *sine die* without confirming the same, nor shall he be eligible for re-appointment to fill the vacancy caused by such refusal or failure to confirm. No person, while employed by, or holding any office in relaton to, any transportation or transmission company, or while in anywise financially interested therein, or while engaged in practicing law, shall hold office as a member of the said commission, or perform any of the duties thereof. At least one of the commissioners shall have the qualifications prescribed for judges of the Supreme Court of Appeals; and any commissioner may be impeached or removed in the manner provided for the impeachment or removal of the judge of said court. The commission shall annually elect one of their members chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed and subject to removal, by the commission. It shall prescribe its own rules of order and procedure, except so far as the same are specified in this Constitution or any amendment thereof. The General Assembly may establish within the department, and subject to the supervision and control, of the commission, subordinate divisions, or bureaus, of insurance, banking or other special branches of the business of that department. All sessions of the commission shall be public,
61 and a permanent record shall be kept of all its judgments, rules, orders, findings and decisions, and all reports

made to, or by it. Two of the commissioners shall constitute a quorum for the transaction of business, whether there be a vacancy in the commission or not. The commission shall keep its office open for business on every day except Sundays and legal holidays. Transportation companies shall at all times transport, free of charge, within this State, the members of said commission and its officers, or any of them, when engaged on their official duties. The General Assembly shall provide suitable quarters for the commission and funds for its lawful expenses, including pay for witnesses summoned, and costs of executing processes issued, by the commission of its own motion; and shall fix the salaries of the members, clerks, assistants and subordinates of the commission and provide for the payment thereof; but the salary of each commissioner shall not be less than four thousand dollars per annum. After the first day of January, nineteen hundred and eight, the General Assembly may provide for the election of the members of the commission by the qualified voters of the State; in which event vacancies thereafter occurring shall be filled as hereinbefore provided, until the expiration of twenty days after the next general election, held not less than sixty days after the vacancy occurs, at which election the vacancy shall be filled for the residue of the unexpired term.

SEC. 156. *Powers, duties and method of procedure of Commission.*

(*a*) Subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State. The Commission shall prescribe the forms of all reports which may be required of such corporations by this Constitution or by law; it shall collect, receive, and preserve such reports, and annually tabulate and publish them in statistical form; it shall have all the rights and powers of, and perform all the duties devolving upon, the Railroad Commissioner and the Board of Public Works, at the time this Constitution goes into effect, except so far as they are inconsistent with this Constitution, or may be hereafter abolished or changed by law.

(*b*) The Commission shall have the power and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the man-

ner hereinafter authorized, such rates, charges, classi-
62 fication of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical conditions of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company. Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the City of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length for the time and in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications

of traffic, for transportation and transmission companies,
63 shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws; provided, however, that nothing in this section shall impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the commission, as far as possible, to effect by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons.

(*c*) In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the commission while in session and to enforce compliance with any of its lawful orders or requirements by adjudging, and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchise for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the commission, within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed, or authorized by law; and each day's continuance of such failure or refusal after due service upon such corporation of the order or re-

quirement of the commission, shall be a separate offense: pro-
64 vided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

(*d*) From any action of the commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in subsection (e) of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges, or classifications or traffic, schedule facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws provide for appeals from any other action of the commission by the commonwealth or by any person interested, irrespective of the amount involved. All appeals from the commission shall be to the Supreme Court of Appeals only; and in all appeals to which the commonwealth is a party, it shall be represented by the Attorney General or his legally appointed representatives. No court of this commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the commission, within the scope of its authority or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, however, that the writs of madamus and prohibition shall lie from the Supreme Court of Appeals to the commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer.

(*e*) Upon the granting of an appeal, a writ of supersedeas may be awarded by the Appellate Court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the Appellate Court, no action of the commission prescribing or affecting the rates, charges, or classifications of traffic of any transportation or transmission company shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceedings re-

sulting from such appeal, until a suspending bond shall first
65 have been executed and filed with, and approved by, the commission (or approved on review by the Supreme Court of Appeals), payable to the commonwealth, and sufficient in amount and security to insure the prompt refunding by the appealing corporation to the parties entitled thereto, of all charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the court on appeal. The commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any supersedeas), of the order or requirement appealed from, to keep such accounts, and to make to the commission, from time to time, such reports, verified by oath, as may, in the judgment of the commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the commission appealed from, together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company pending the appeal be not sustained on such appeal; and the commission shall also, from time to time, require such company, under like penalty, to give additional security on, or to increase, the said suspending bond, whenever, in the opinion of the commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid. Upon the final decision of such appeal, all amounts which the appealing company may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the company to the parties entitled thereto, in such manner, and through such methods of distribution as may be prescribed by the commission, or by law. All such appeals affecting rates, charges or classifications of traffic, shall have precedence upon the docket of the Appellate Court, and shall be heard and disposed of promptly by the court, irrespective of its place of session, next after the *habeas corpus*, and Commonwealth's cases already on the docket of the court.

(f) In no case of appeal from the commission shall any rule or additional evidence be introduced in the Appellate Court; but the chairman of the commission, under the seal of the commission, shall certify to the Appellate Court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission as may be selected, specified and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify. The commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the Appellate Court, upon disposing of the appeal. The Appellate Court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the commission appealed from, as well as any other matter

arising under such appeal: provided, however, that the ac-
65 tion of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct: but the court may, when it deems necessary, in the interests of justice, remand to the commission any case pending on appeal, and require the same to be further investigated by the commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the commission by any party in interest), before the appeal is finally decided.

(*g*) Whenever the court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such order as, in its opinion, the commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the commission at the time the original order appealed from was entered. The right of the commission to prescribe and enforce rates, charges, classifications, rules and regulations, affecting any or all actions of the commission theretofore entered by it and appealed from, but based upon circumstances or conditions different from those existing at the time the order apealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the commission prescribing or altering such rates, charges, classifications, rules, or regulations, shall be retroactive.

(*h*) The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit, or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the commission; but, in no such proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the commission, within the scope of its authority, and then in force, be questioned; provided, however, that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals is authorized by this Constitution or by any law passed in pursuance thereof.

(*i*) The commission shall make annual reports to the Governor of its proceedings, in which reports it shall recommend, from time to time, such new or additional legislation in reference to its powers or duties, or to the creation, supervision, regulation, or control of corporations, or to the subject of taxation, as it may deem wise or expedient, or as may be required by law.

(*j*) (No sub-div. "*j*" in official copy).

67 (*k*) Upon the organization of the State Corporation Commission, the Board of Public Works and the office of Railroad Commissioner shall cease to exist, and all books, papers and documents pertaining thereto, shall be transferred to, and become a part of the records of, the office of the State Corporation Commission.

(*l*) After the first day of January, nineteen hundred and five, in addition to the modes of amendment provided for in Article XV of this Constitution, the General Assembly, upon the recommendation of the State Corporation Commission, may, by law, from time to time, amend sub-sections (*a*) to (*i*), inclusive, of this section, or any of them, or any such amendment thereof: provided, that no amendment made under authority of this sub-section shall contravene the provisions of any part of this Constitution other than the sub-sections last above referred to or any such amendment thereof.

68 EXHIBIT C.

VIRGINIA:

Before the State Corporation Commission.

In the matter of a proposed rule, regulation, order or requirement of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers over the lines of any railroad in this State, operated by steam, between points in the State of Virginia.

Answer of Southern Railway Company.

Southern Railway Company, a corporation of the State of Virginia, the principal office of which is in the City of Richmond, in said State, respectfully represents that beginning the 1st day of August, in the year 1906, this Honorable Commission, caused to be published once a week for four successive weeks in the Times-Dispatch, a newspaper published in the City of Richmond, the following notice:

Notice.

Offices of the State Corporation Commission.

RICHMOND, VA., 31*st Day of July*, 1906.

To the Several Steam Railroad Companies Doing Business in Virginia, and all Persons Interested:

Take notice that the State Corporation Commission will, in the City of Richmond, on Thursday, the first day of November, 1906, at 12 o'clock, noon, in accordance with authority conferred by the Constitution of Virginia and the statutes enacted by the Gen-
69 eral Assembly of Virginia pursuant thereto, hear and consider any objections which may be urged against a rule, regu-

lation, order or requirement of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one railroad company, or joint transportation over the lines of two or more companies; and whether the contract for transportation of a passenger or passengers be evidenced by an ordinary ticket between stations, by a mileage book or otherwise; the commission to have, as authorized by law, the power and authority, from time to time, and as often as circumstances may require, to change or revise the rate, or by rules, regulations, and requirements to provide for the more convenient and expedient putting into effect and proper observance of said maximum rate. At the said hearing and consideration of the said maximum rate of two cents per mile, the method, time and extent of promulgating and putting into effect of the same will be heard and determined by the Commission, to the end that a maximum rate for passenger transportation may be put into effect and be made applicable to all steam railroad companies doing business in Virginia, and be properly observed by them in the transportation of passengers.

BEVERLEY T. CRUMP, *Chairman;*
H. C. STUART,
JOSEPH E. WILLARD,
Commissioners.

In accordance with said notice, this respondent now appears and respectfully shows the following causes why the rule, regulation, order or requirement mentioned in said notice should not be put into effect on the railroad lines of this respondent.

First. This respondent respectfully shows that the proposed rule, regulation, order or requirement, as set forth in said notice, and the action of this Honorable Commission in the premises, are based upon certain public enactments by the people of the State of Virginia in convention assembled, as from Sections 155 and 156 of the Constitution of Virginia, herewith filed as a part of this answer and marked "Appendix No. 1," and from certain statutes of the State, to which special reference is hereby made, will fully and at length appear; and this respondent now respectfully shows that the said provisions in the Constitution of the State of Virginia and said statutes seek to confer upon this Honorable Commission administrative, executive, legislative and judicial powers and functions in respect to the same matter, and, as applied and proposed to be applied to this respondent and to its property in the premises, do not constitute due process of law, nor afford to this respondent the
70 equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

This respondent further and additionally pleads and shows that Section Five of the Bill of Rights of Virginia, which, in the Constitution of that State, is declared to be "the basis and foundation of government," provides as follows:

"That the legislative, executive, and judicial departments of the State should be separate and distinct;"

and the 39th Section of the Constitution of Virginia provides:

"Except as hereinafter provided, the legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."

The single exception alluded to in Section Thirty-nine of said Constitution embraces matters relating to the performance by transportation and transmission companies of their public duties and their charges therefor, in regard to which alone the separation of the legislative, executive and judicial departments is, by the Constitution of Virginia, denied.

While, therefore, for the protection of every other interest in Virginia, a legislative body is created by the Constitution and laws of that State which is subject to the primary limitation and restraint of a different and independent judicial tribunal, and a judicial tribunal is provided by the constitution and laws of that State which is not clothed with legislative and executive functions in respect to the matters in which it is required to exercise its judicial functions, and, therefore, by the law of its creation is capable of judicial consideration and judicial action in respect to them, this, by the constitutional system of Virginia, is denied to transportation and transmission companies in respect to controversies arising about their public duties and their charges therefor. In respect to these, this Honorable Commission has been established by the Constitution, which seeks to impose, and, if valid, does impose upon the Commission the duty or invest it with the power, of instituting proceedings before itself in respect to the public duties of transportation and transmission companies and their charges therefor, without any other party complainant except the Commission itself, of legislating thereon and making rules and orders in respect thereto, after the proceedings have been thus instituted before it by itself; of enforcing, as a court, compliance with the orders or requirements which it has made in the matters thus brought before it and thus legislated on or ruled upon, and of adjudging or enforcing against the defendants, the fines and penalties prescribed or authorized by the Constitution or by law.

71 This respondent respectfully submits that this Honorable Commission, by the law of its creation, is thus, and is otherwise as will appear from the said Constitution, made incapable of the judicial consideration and judicial action in respect to the large interests above mentioned of transportation and transmission companies which due process of law requires; and, in the knowledge that it has power, as a judicial tribunal, to pass upon the validity of its acts in the other capacities referred to, it is put in a position of freedom from the usual and necessary restraints of legislative bodies in respect to matters about which it may legislate. In subjecting these large interests to a tribunal thus created, and denying

to them the primary protection of judicial tribunals which are not clothed with legislative, administrative and executive functions in respect to matters in which they are called upon to exercise their judicial functions, such as are provided for every other interest in the State by the Constitution and laws of Virginia, and in subjecting them to the legislative power of this tribunal, unlimited and unchecked by the ordinary and orderly primary responsibility to an independent judicial tribunal, the said Constitution not only does not constitute, in respect to transportation and transmission companies, due process of law, but it likewise denies to them the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of *its* property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

And this respondent respectfully prays the benefit and protection of the said Fourteenth Amendment to the Constitution of the United States in respect to the proposed rule, regulation, order or requirement of this Honorable Commission in this case.

Second. This respondent, for further and additional cause why the said rule, regulation, order or requirement should not be put into effect as to it, respectfully shows that it is a railroad company, duly created, organized, existing and doing business under the laws of the State of Virginia, by virtue of three certain acts of the General Assembly of Virginia, approved respectively February 20, 1894, January 23, 1900, and February 26, 1902, and respectively entitled in the order named:

"An act authorizing the purchasers of the Richmond and Danville Railroad Company, their assigns and successors, to become and be a corporation and adopt a name therefor, and to possess and exercise general powers, and to authorize the lease to or by, and the consolidation therewith of, other corporations;"

"An act to provide for the reduction of the capital stock and the issue of special stock of Southern Railway Company," and

"An act to amend and re-enact section seven of an act approved February 20, 1894, entitled an act authorizing the purchasers of the Richmond and Danville Railroad Company, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers and authorizing the lease to or by, and the consolidation therewith of, other corporations."

72 A copy of which three several acts and a duly certified copy of the certificate of organization required by the third paragraph of the said act of February 20, 1894, filed in the office of the Secretary of the Commonwealth of Virginia on the 14th day of December, 1894, are herewith filed as a part of this answer, marked Exhibit A, the said certified copy being made by the laws of the State of Virginia conclusive evidence of the existence of such corporation.

This respondent was duly organized into a corporation in the year 1894, under and by virtue of said first-mentioned act, and is now and has been ever since a corporation existing and doing business

under the said laws of the State of Virginia and the general statutes of that State applicable thereto.

At the time of its incorporation aforesaid, there were in existence in the State of Virginia, entering into and forming a part of the charter of this respondent, certain public laws of the State, which had heretofore been passed and which had been enacted into the act commonly known as the Code of Virginia of 1887, namely Sections 1202, 1240 and 1242 thereof, a true copy of which is herewith filed as a part of this answer marked Appendix No. 11, and this respondent shows that said Sections 1202, 1240 and 1242 of the said Code were inducements for it to accept its charter and to organize into a corporation and to do business as above set forth, and the same were accepted by it and entered into and became a part of the contract between it and the State of Virginia.

Relying upon its said charter and the said public laws above referred to as a part thereof, this respondent caused itself to be organized, and made, issued and caused to be sold its bonds and stocks to the amount of many millions of dollars; and the purchasers of the same, in making their investments in the said bonds and stocks of this respondent, also relied upon the said contractual obligations which existed between this respondent and the State of Virginia, and this respondent has in all respects organized, managed and adjusted its affairs and conducted its business in like reliance upon its said contract with the State of Virginia.

While the General Assembly of Virginia, in enacting the said public laws above referred to, reserved the right to alter, modify and repeal the charters of any railway company governed thereby, it expressly excepted from such right of alteration, modification or repeal the power to change the tolls of this company without its assent, as follows:

"Except that no law shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent in any other cases except such as are specially provided for in this chapter."

and thereby secured to this respondent, as a contractual right with the State of Virginia, the right to charge, receive and collect the tolls as fixed and established and permitted in said public acts.

73 This respondent denies that any of the events have happened which satisfy the condition precedent established by said statute to the exercise of any right on the part of the State of Virginia to change the tolls of this respondent without its assent; and likewise denies that any exceptional case has arisen or exists such as is specially provided for in the chapter last herein referred to. The net profits of this respondent have never amounted to a sum equal to its capital stock with six per centum per annum interests thereon; its net profits have never been such that dividends might be declared out of the same exceeding, or as much as, the rate of fifteen per centum per annum on the capital stock invested; and the net profits of this respondent have never been such that any dividend could have been declared, and no dividend has been declared, so much as thirty years before the notice issued in this cause, this re-

spondent only having been organized about twelve years ago, and its first dividend on its preferred stock, amounting only to one per centum per annum, having been declared in the year 1896, and having been made payable January 4, 1897, and no dividend on the common stock of this respondent ever having been declared, and no dividend thereon ever having been possible, out of the net profits of this respondent.

No dividend has been declared on any of its stock since this respondent was organized, except as follows:

Dividend number.	Par pref. stock.	%	Am't of div.	Paid.
1	$54,300,000	1	$543,000.00	January, 1897.
2	54,300,000	1	543,000.00	January, 1898.
3	57,290,400	1	572,904.00	January, 1899.
4	60,000,000	1	600,000.00	October, 1899.
5	60,000,000	1½	900,000.00	April, 1900.
6	60,000,000	1½	900,000.00	October, 1900.
7	60,000,000	2	1,200,000.00	April, 1901.
8	60,000,000	2	1,200,000.00	October, 1901.
9	60,000,000	2½	1,500,000.00	April, 1902.
10	60,000,000	2½	1,500,000.00	October, 1902.
11	60,000,000	2½	1,500,000.00	April, 1903.
12	60,000,000	2½	1,500,000.00	October, 1903.
13	60,000,000	2½	1,500,000.00	April, 1904.
14	60,000,000	2½	1,500,000.00	October, 1904.
15	60,000,000	2½	1,500,000.00	April, 1905.
16	60,000,000	2½	1,500,000.00	October, 1905.
17	60,000,000	2½	1,500,000.00	April, 1906.
18	60,000,000	2½	1,500,000.00	October, 1906.

This respondent has not, since the passage of an act of the General Assembly of the State of Virginia, entitled "An Act Concerning Corporations," which became a law on the 21st day of May, in the year 1903, either purchased, merged, or consolidated with itself any railroad competitive with it between points both of which are in the State of Virginia, nor has it, since the passage of the last
74 mentioned act, accepted or effected any amendments to, or of, its charter thereunder, and it expressly avers that it has never, at any time, nor does it now, assent to any change in its tolls or rates, and it has not in any way waived or lost the right guaranteed to it by the said contract with the State of Virginia in respect to its tolls or rates.

On the contrary this respondent insists that it is entitled to the benefit of Paragraph One of Section Ten of Article One of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of a contract, and submits that, inasmuch as the State of Virginia can not take action having this effect, it is not within the power of this honorable Commission, organized and existing under the laws of the State of Virginia, and exercising in that regard no greater power than the power of the State in the premises, to impair the obligation of the contract herein-

before set forth by the adoption and promulgation of the proposed rule, regulation, order or requirement, which materially changes the rates and tolls of this respondent as they at present exist and reduce them materially below the amounts permitted by its said contract with the State of Virginia, and this respondent prays that it may have in the premises the full benefit of the provisions of the Constitution of the United States hereinbefore referred to for the preservation of its contractual rights in respect to its rates and tolls.

Third. For further and additional ground against the adoption and promulgation of the proposed rule, regulation, order or requirement, this respondent shows that, under and by virtue of the authority of the State of Virginia, it not only owns and operates lines in the State of Virginia, but also in the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Indiana and Illinois, and does, in addition to an intrastate passenger business in the State of Virginia, a large interstate passenger business in said State and in and between all the other States aforesaid, and that the proposed rule, regulation, order or requirement would necessarily result in the disturbance and regulation of the interstate rates of this respondent. This respondent respectfully says, that, under the Constitution of the United States, Article One, Section Eight, Paragraph Three, Congress alone has power to regulate commerce between the States, and this respondent avers that the adoption and promulgation of the said proposed rule, regulation, order or requirement would, because many of its interstate passenger rates are made, and necessarily made, on combinations of locals, or by the use of a local rate as a factor, necessarily disturb and regulate its interstate traffic and commerce to such an extent as to come within the purview of the clause of the Federal Constitution above referred to in this paragraph, the benefit and protection of which clause this respondent now invokes in the premises.

Fourth. This respondent shows, as a further cause against the said rule, regulation, order or requirement, that the effect of the same, would, as will appear from the consideration now about to be set forth, be to deprive this respondent of its property without
75 just compensation and without due process of law and to deny to it the equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States, the benefit and protection of which the respondent respectfully claims.

The existing passenger rates and charges in effect upon this respondent's lines in the State of Virginia and applicable to intrastate business in said State are not higher than is just and reasonable, whether considered in respect to the value of the property used in the public service, or in respect to the value of the service rendered to the passenger, and are correctly set forth in Exhibits numbered 1 to 7, both inclusive, herewith filed with this answer and asked to be taken and read as a part hereof.

This respondent further shows that the effect of the said rule, regulation order or requirement now proposed to be put into effect by this Honorable Commission upon the business of this respondent between points both of which are in the State of Virginia and which does not pass out of said State en route would be to reduce its earn-

ings below what it is entitled to earn as a reasonable profit upon the value of its property used in performing the service, and in thus depriving it of the legitimate use of its property, the effect of the proposed rule, regulation, order or requirement will be to deprive this respondent of its property, without just compensation, and deprive it of the equal protection of the laws and to take its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which it respectfully claims.

This respondent further shows that the effect of the establishment of the proposed rule, regulation, order or requirement, would not be limited to the intrastate business in Virginia of this respondent, but the said rule, regulation, order or requirement would inevitably affect the interstate business of this respondent and impair and diminish the revenues derived therefrom. This inevitably follows from the fact that many of these interstate rates are made, and necessarily made, on a combination of locals, or by the use of locals as a factor, and where the local within the State of Virginia is reduced the inevitable effect upon the revenues of this respondent from its interstate business would be a reduction, and accordingly the total loss which this respondent would have to incur in the event that the proposed rule, regulation, order or requirement is made effective would not be represented simply by the figures above given, but a very considerable and appreciable loss would necessarily be added thereto growing out of the reductions on its interstate business as aforesaid. Such a reduction would also follow a reduction in the interline rates participated in by this respondent in Virginia.

This respondent further says that there is now pending before this Honorable Commission consideration of a proposed new classification, rates and charges to be applied to the intrastate freight traffic of this respondent in the State of Virginia, the effect of which classification, rates and charges, if put into effect, would be to further reduce largely the net earnings of this respondent from its Virginia intrastate business.

76 This respondent submits that it would not be fair or just to consider the question of reducing its passenger rates, separate and apart from the consideration and determination of the said question now pending before this Honorable Commission, in respect to the freight rates of this respondent.

The general commercial conditions in Virginia are prosperous, the transportation service rendered by this respondent, in intrastate transportation, is large and at reasonable rates the returns therefor to this respondent would be much greater.

This respondent further shows that there will be no compensatory increase in the business of this respondent resulting from the reduced rates proposed to be established by this Honorable Commission.

The lines of railway of this respondent have at all times been operated as economically as practicable, and its operating expenses have at all times been as reasonable and low in amount as they could be made by economical and judicious management, and it has not been possible for this respondent to operate its road for less than it has been operated.

In all respects it has confined its operating expenses, its taxes, its interests, and every other expenditure within the lowest and narrowest limits reasonably practicable.

This respondent, therefore, respectfully shows that the result of the said rule, regulation, order or requirement would be to deprive this respondent of its property without just compensation, to deprive it of the equal protection of the laws and to take its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which it respectfully claims.

Fifth. For further cause against the adoption and promulgation of the proposed rule, regulation, order or requirement, this respondent shows that its present rates are not higher than a reasonable compensation for the service rendered by it to the traveling public and are in no sense excessive or extortionate; that they are not unjustly, unduly, unreasonably or illegally discriminatory as between individuals, nor as between localities, and in no way violate any law. This respondent is advised that it has, as an incident of its property and as a property right, the right to charge, for each service which it renders, a reasonable compensation, and that this respondent is protected by the Fourteenth Amendment to the Constitution of the United States in making, receiving and collecting such charge.

The effect of the proposed rule, regulation, order or requirement would be to materially diminish this respondent's charges and reduce them greatly below what would be a reasonable compensation for the respective services rendered to the shippers.

This respondent is advised that to prevent it from charging reasonable compensation for the service rendered the passenger would be to deprive it of its property without just compensation and without due process of law, and would be to deny it the equal protection of the laws, and this respondent again claims, in this regard, the benefit and protection of the Fourteenth Amendment to the Constitution of the United States, and shows, that, if the proposed rule,
77 regulation, order or requirement is adopted and put into effect by the State of Virginia, the result would be, as aforesaid, to deprive it of its property contrary to the Fourteenth Amendment to the Constitution of the United States.

For the foregoing causes, and for many others appearing either on the face of the said proposed rule, regulation, order or requirement, or from the statutes and general principles of law applicable in the premises, which will be hereafter made specifically to appear from the evidence adduced in support of this answer, this respondent prays that the said rule, regulation, order or requirement shall not be adopted or promulgated by this Honorable Commission.

And now, having fully answered, this respondent prays to be hence dismissed with its reasonable costs in this behalf expended.

SOUTHERN RAILWAY COMPANY,
By ——— ———, *Passenger Traffic Manager.*

——— ———,
Attorney for
Southern Railway Company.

The above answer was duly signed and sworn to.

78 EXHIBIT D.

SEC. 1202. *Rates of Toll on Railroads.*—On a railroad on which different rates are not prescribed by law, the following rates of toll may be charged for transportation, to-wit: Of a person and his baggage within a hundred and fifty pounds, not exceeding six cents per mile; of produce and other articles, except gypsum, lime, guano, and other specific manures, not exceeding eight cents per ton per mile; and gypsum, lime, guano, and other specific manures, not exceeding four cents per ton of twenty-two hundred and forty pounds per mile; and for the transportation of any person, or of any produce or other articles for a distance less than ten miles, a charge may be made at the foregoing rates as for ten miles. And where articles weigh less than four pounds to the cubic foot, a toll may nevertheless be charged on each cubic foot as for four pounds weight. And when the articles in any one consignment weigh less than one hundred pounds a toll may be charged on the same as for one hundred pounds weight. If for the transportation of any person with his baggage, or for any consignment, the whole charge at the rates before mentioned would be less than twenty-five cents, the same may nevertheless be charged as a minimum. For the weighing, storage, and delivery of articles at any depot or warehouse of the company, a charge may also be made not exceeding the ordinary warehouse rates charged in the city or town in which, or nearest to which, the depot or warehouse is situated.

SEC. 1240. *Amendment or Repeal of Charters of Certain Companies.*—The charter of every company which is governed by the act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and of every company heretofore or hereafter incorporated, which shall be governed by this chapter may be altered, modified or repealed by any future legislature as may seem to it proper, except that no law shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent, in any other cases than such as are specially provided for in this chapter.

SEC. 1242. *Regulations as to Dividends.*—When the net profits of any company heretofore or hereafter incorporated, which may be governed by this chapter, shall be such that, but for this section, dividends might be declared out of the said profits exceeding the rate of fifteen *per centum per annum* on the capital stock invested, laws may be passed for reducing the tolls of the company. But no law shall reduce the tolls so as to prevent dividends of fifteen *per centum per annum*, within thirty years from the time the first dividend or profits of the said company was declared, or so as to prevent dividends of twelve *per centum per annum* after the said thirty years and before fifty years from the same time, or so as to prevent dividends of ten *per centum per annum* after the said fifty years.

79 *Affidavit of W. H. Tayloe, General Passenger Agent of Southern Railway Company on Behalf of Complainant.*

Filed May 8th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

The affiant, W. H. Tayloe, being first duly sworn, states:

That he is General Passenger Agent of the complainant Southern Railway Company, and well acquainted with its passenger business in Virginia and other states; that during the year ended June 30, 1905, and continuously since, and for some years prior thereto, the said Southern Railway Company owned, operated and controlled lines of railroad which constitute the system known as the Southern Railway Company in the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Indiana and Illinois which said lines are continuous, except that it has no connection by rails owned by it between that part of its system lying in the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi and Tennessee, and that part of its system lying in the states of Kentucky, Indiana and Illinois.

The affiant further states that the said Southern Railway
80 Company owns, operates and controls 965.63 miles of railroad within the state of Virginia, which form a part of the continuous system of the road of the said Southern Railway Company lying in the states of Virginia, North Carolina, Southern Carolina, Georgia, Florida, Alabama, Mississippi and Tennessee; and that it *is* so operated and controlled the same for some years last past, and in addition to intrastate passenger business in Virginia, it does a large interstate passenger business into and from said state and through said state, and in and between all the other states aforesaid, and other states of the United States, and also a large foreign commerce with other countries.

The affiant further states that he is well acquainted with the passenger tariff of the Southern Railway Company as applicable to intrastate business in the State of Virginia; that said passenger tariff is in no respect unjustly or unreasonably high, nor greater than the service performed in consideration thereof is justly and reasonably worth, and no greater than will return a fair compensation for the property employed in such intrastate service.

The affiant further states that since said passenger rates were fixed the operating expenses of the said Southern Railway Company have largely increased; that it is compelled to pay more for the services of its employees and for the purchase of material and

supplies which are necessary to the operation of the railroad and keeping the same in good order and condition; and that since the said passenger rates were fixed, the complainant has greatly improved the quality of the passenger service, intra and interstate, furnished its patrons in Virginia.

81 The affiant further states that the passenger rates and charges proposed to be put into effect by the State Corporation Commission of Virginia in its order of April 27, 1907, are unjustly, unreasonably, and unfairly low, and that the said rates would not furnish to the complainant a fair, just, or reasonable compensation for the service rendered, and would not afford to the complainant a just, reasonable, or fair return upon its property used in performing the service.

Affiant further says that if said rates were put into effect the revenues of the complainant would be largely reduced, and there would not be any such increase in the amount of its passenger business resulting from the proposed lower rates as would compensate the complainant for the loss of revenue, and affiant further states that there would be no appreciable increase in its passenger business because of such lower rates.

Affiant further says that its existing passenger rates fabric is properly adjusted in its relation between its interstate rates and its intrastate rates in Virginia and in other states; that interstate rates are made in almost all instances upon a combination of intrastate rates with other rates, and that intrastate rates have at all times a most important bearing and influence upon interstate rates; that the proposed reduction in its intrastate rates in Virginia would result not only in a diminution of revenue from intrastate passenger traffic, but a diminution of revenue from passenger traffic going into and out of and through the State of Virginia; that this diminution in its interstate earnings will be material and important; that any reduction in its passenger revenues will seriously embarrass and obstruct it in providing, and will deprive it of its power to

82 properly provide, the facilities which the public commerce dependent upon it for transportation absolutely requires for the movement of traffic, both intrastate and interstate, in Virginia and other states.

W. H. TAYLOE.

DISTRICT OF COLUMBIA, *City of Washington, To wit:*

I, Harry F. Pierce a Notary Public, in and for the City of Washington, in the District of Columbia, do certify that W. H. Tayloe, whose name is signed to the foregoing affidavit, personally appeared before me in my City and District aforesaid, and made oath that the statements contained in the said affidavit are true.

My commission as Notary Public expires on the 17th day of July, 1910.

Given under my hand and official seal, this 8th day of May, 1907.

[NOTARIAL SEAL.] HARRY F. PIERCE,
Notary Public.

83 *Affidavit of A. H. Plant, Comptroller of Southern Railway Company on Behalf of Complainant.*

Filed May 8th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

The affiant, A. H. Plant, being first duly sworn, deposes and says: That he is, and for some years past has been, Comptroller of the Southern Railway Company, and as such has supervision over its accounts and charge of its books, and that the following is a true statement of the results of operation of the Southern Railway Company in the State of Virginia during the year ended June 30, 1905, under the rates and classifications existing at that time:

Gross earnings from operation in Virginia for said year, including both interstate and intrastate...		$6,902,875.02
Total gross revenue from intrastate traffic in Virginia, passenger and freight, for said year.....		1,859,435.26
The ratio of total gross intrastate revenue in said State to the total gross revenue in said State, for said year was		26.94%
The above mentioned gross earnings in Virginia for said year from intrastate traffic were made up as follows:		
84 From Freight		$844,063.71
From Passenger		715,134.65
From other traffic.....		300,236.90
That the expense of earning this gross state revenue would not be less than eighty-five cents to earn one dollar, exclusive of taxes.		
That on this basis the maximum net earnings from intrastate traffic for said year, without allowing for taxes		$278,915.29
Taxes chargeable to Virginia properties for the fiscal year ended June 30, 1905, were	$213,339.72	
Intrastate proportion, (26.94%)...	57,473.72	
Improvements and betterments on Virginia property not capitalized.	$143,370.20	
Intrastate proportion, (26.94%)....	38,623.93	
Making total intrastate proportion of taxes and improvements and betterments not capitalized....		96,097.65
Showing maximum net intrastate earnings from operation in the State of Virginia for said year..		182,817.64

Applying the above mentioned intrastate passenger business in Virginia for the year ended June 30, 1905, the passenger rates fixed in the order of the State Corporation Commission of Virginia of April 27, 1907, the said passenger business would show a net reduction of not less than.....	174,984.47
Which shows intrastate earnings for said year amounting to	7,833.17
The value of the physical properties of this Company in Virginia, according to the assessment made by the State for the purposes of taxation was, for said year.....	$12,807,857.00
The franchise tax, capitalized at the same rate of taxation, imposed upon its physical properties, to-wit, thirty-five cents on the hundred dollars, would show a value for said year of.....	17,069,828.57
Or a total of	$29,877,685.57
The proportion of this tax value used for intrastate purposes should be ascertained on the basis of user, which is on the basis of the proportion of gross earnings from intrastate business to the total gross earnings from all business for said year in Virginia, or 26.94%.	
26.94% of this total is.....	$8,049,048.49
26.94% of the assessment of the physical properties is	$3,450,436.68
Maximum net revenue from intrastate traffic in Virginia under the proposed passenger rates would only amount to ten one hundredths of one per cent.; and on the said proportion of the tax assessment of the physical properties would only amount to twenty-three one hundredths of one per cent.	

The affiant further says that the foregoing results of operation in the State of Virginia for the year ended June 30, 1905, show a relatively larger net result to the Company than is fairly representative of the results of the Company's operations in the future, for the reason that since the thirtieth of June, 1905, there has been a large increase in the expenses of the Company, due to increases in wages, and to the increases in the cost of all material and supplies and other expenses, as will be shown by the following statement for the system of such increases since the thirtieth day of June, 1906, namely:

For the six months ended December 31, 1906, the gross earnings have increased over the same period of the previous year.....	$1,711,861.79
Whereas the operating expenses and taxes increased for the same period.....	2,623,979.77
Showing a decrease in net earnings for the six months mentioned of	912,117.98

In addition to the foregoing increases in wages and other expenses, the Company has been obliged to accept large increases in wages since the first of January, 1907, and is confronted with still further very substantial demands for increases in wages.

86 While the above figures are for the System, a proportionate part of said increases in expenses would apply to Virginia.

A. H. PLANT.

DISTRICT OF COLUMBIA, *City of Washington, To-wit:*

I, Alfred H. Oliver, a Notary Public, in and for the City of Washington, in the District of Columbia, do certify that A. H. Plant, whose name is signed to the foregoing affidavit, personally appeared before me in my City and District aforesaid, and made oath that the statements contained in the said affidavit are true.

My commission as Notary Public expires on the 18th day of August, 1911.

Given under my hand and official seal, this 8th day of May, 1907.

[NOTARIAL SEAL.] ALFRED H. OLIVER,
Notary Public.

87 *Temporary Restraining Order.*

Entered and Filed May 8th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

Upon reading the verified bill in this cause, and upon its being made to appear to the Court that there is danger of irreparable injury to the complainant from delay, unless the acts sought to be enjoined herein are restrained until a hearing upon the motion for an injunction in this cause, it is now ordered:

1. That the defendants, Beverley T. Crump, Henry C. Stuart, and Joseph E. Willard, constituting the State Corporation Commission of Virginia, and each and all of their successors in office, their and each of their servants, agents and employees, be, and they are, hereby restrained and enjoined from publishing, or having published, in any newspaper published in the City of Richmond, the general order of the State Corporation Commission bearing date the twenty-seventh day of April, 1907, in respect to passenger rates, in the bill in this cause mentioned, and from taking any other step or steps whatsoever under the Constitution or laws of Virginia to enforce the requirements of the said order.

2. That the defendant R. T. Wilson, Clerk of the State
88 Corporation Commission, and his successors in office, and his agents, servants and employees, be, and they are, hereby re-

strained and enjoined from publishing or having published the said order of the State Corporation Commission in any newspaper published in the City of Richmond, Virginia.

3. That the owner, proprietor, or manager, or agent of any such owner, proprietor or manager, of any newspaper in the City of Richmond, Virginia, be, and each and every one of them is, hereby restrained and enjoined from publishing, or having published, under the direction of the State Corporation Commission, or of the Clerk thereof, such order of the State Corporation Commission.

4. That the defendants and each of them show cause before this court in the United States Court Room at Asheville, N. C. at ten o'clock a. m. on Thursday, the 27th day of June, 1907, why an injunction *pendente lite*, as prayed in the bill, should not be issued, and that a copy of this order be served as soon as practicable upon each of the defendants.

5. That this restraining order shall be in force and effect from the date hereof, and until the determination of the complainant's motion for an interlocutory injunction herein: provided, however, that upon the failure of the complainant or some one for it, to execute, within ten days from this date, a bond in a penalty of Ten Thousand Dollars, payable to the defendants, with surety approved by one of the judges of this court, and conditioned substantially as hereinafter mentioned, the said restraining order shall stand dissolved. The condition of said bond shall be substantially as follows:

"The condition of the above obligation is such that

Whereas a restraining order has been made in the above entitled cause, by the terms of which the defendants, and each
89 of them, are restrained, until an application for an interlocutory injunction herein shall be determined, from doing or causing to be done, certain acts mentioned in said restraining order; now should said restraining order be dissolved or vacated as having been wrongfully issued or because the said acts were improperly restrained, then that the above named Southern Railway Company shall pay, or cause to be paid, all damages caused by the issue of said restraining order and the costs of this cause in connection therewith."

6. That, if for any reason the determination of the motion for an injunction *pendente lite* be not made until after July 1, 1907, the date fixed in the said order of the State Corporation Commission of Virginia for the rates thereby prescribed to go into effect, then the complainant shall, prior to that date, apply to this court, or a judge thereof, for an order directing the giving of a bond by the complainant as prayed for in the fourteenth paragraph of the bill in this cause, to secure the payment into the registry of this court, in case the said order of the Commission herein complained of is in this cause finally declared valid and constitutional, of the excess which the complainant may receive on business covered by said order, over the amount it would have been entitled to receive on the basis of charges fixed by said order.

May 8th, 1907.

J. C. PRITCHARD,
United States Circuit Judge.

And thereupon came the above named complainant and filed the bond as provided in this order, which bond was this day ap-
90 proved by a judge of this court as a full compliance with the provision thereof requiring the giving of a bond.

May 8th, 1907.

J. C. PRITCHARD,
United States Circuit Judge.

Marshal's Return.

Executed May 9th, 1907, by delivering in person to Joseph E. Willard at the office of the State Corporation Commission of Virginia in the city of Richmond, Va., a true copy of this order, and further executed May 10th, 1907, by delivering in person to Beverley T. Crump and R. T. Wilson at the office of the State Corporation Commission of Virginia in the city of Richmond, Va., and to John Stewart Bryan in person in the city of Richmond, Va., at the office of the Richmond Times-Dispatch Company, he being a Director and the General Manager of the said Times-Dispatch Company, the said Times-Dispatch being a newspaper printed and published in the city of Richmond, Va., and the President of the said Times-Dispatch Company not being found, and to Alfred B. Williams in person in the city of Richmond, Va., at the office of the News-Leader, a newspaper published in the city of Richmond, Va., he being the President of the News-Leader Company, and to Charles B. Cooke in person in the city of Richmond, Va., at the office of the Evening Journal, a newspaper published in the city of Richmond, Va., he being the President of the said Evening Journal, a true copy of this order, and further executed May 14th, 1907, by delivering in person to Henry C. Stuart at the office of the State Corporation Commission of Virginia in the city of Richmond, Va., a true copy of this order.

MORGAN TREAT,
United States Marshal.

91 *Bond.*

Filed May 8th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

Know all men by these presents that Southern Railway Company, a corporation of the State of Virginia, the principal office of which is in the City of Richmond in said State, as principal, and The United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the defendants, Beverley T. Crump, H. C.

Stuart, Jos. E. Willard and R. T. Wilson in the just and full sum of Ten thousand dollars, for the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents.

Sealed with our seals and dated this eighth day of May, in the year 1907;

The condition of this obligation is such that

Whereas a restraining order has been made in the above entitled case by the terms of which the defendants, and each of them, are restrained until an application for an interlocutory injunction herein shall be determined, from doing or causing to be done certain acts mentioned in said restraining order; now should said restraining order be dissolved or vacated as having been wrongfully
92 issued, or because the said acts were improperly restrained, then, if the above named Southern Railway Company shall pay or cause to be paid all damage caused by the issue of said restraining order and the costs of this cause in connection therewith, then this obligation to be null and void; otherwise to be and remain in full force and effect.

In testimony whereof the parties hereto have caused these presents to be duly signed in their respective names and their respective seals to be hereunto affixed, duly attested, this 8th day of May in the year 1907.

[Seal of Southern Railway Company.]

SOUTHERN RAILWAY COMPANY,
By A. R. ANDREWS, *First Vice President.*

Attest:
GEO. R. ANDERSON,
Assistant Secretary.

[Seal of the United States Fidelity & Guaranty Company.]

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By E. LESLIE SPENCE, Jr., *Attorney in Fact.*

Approved as a full compliance with the provision of the restraininf order entered in this cause on the 8th day of May, 1907, requiring the giving of a bond.

J. C. PRITCHARD,
U. S. Circuit Judge.

93 *Chancery Subpœna.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

The President of the United States of America to Beverley T. Crump, Henry C. Stuart, Joseph E. Willard, individually, and constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of the State Corporation Commission of Virginia, Greeting:

We command you, and every one of you, that you appear before our judges of our Circuit Court of the United States of America, for the Eastern District of Virginia, at the Court Room in the Custom House in the City of Richmond, in said District, on the first Monday in the month of June next, to answer the Bill of Complaint of Southern Railway Company this day filed in the Clerk's Office of said Court, in said City of Richmond, then and there to receive and abide by such judgment and decree, as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Eastern District of Virginia to execute:

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Richmond aforesaid, this 9th day of May, in the year of our Lord one thousand nine hundred and seven, and of our Independence the 131st.

[Seal of United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY, *Clerk.*

94 MEMORANDUM.—The above-named defendants are notified that unless they enter their appearances in the Clerk's Office of said Court, at Richmond aforesaid, on or before the day to which the above writ is returnable, the Complaint will be taken against them as confessed, and a decree entered accordingly.

JOSEPH P. BRADY, *Clerk.*

Marshal's Return.

Executed May 9, 1907, by delivering in person to Joseph E. Willard at the office of the State Corporation Commission of Virginia a true copy of this subpœna, and further executed May 10, 1907, by delivering in person to Beverley T. Crump and R. T. Wilson at the office of the State Corporation Commission of Virginia, in the City of Richmond, Virginia, a true copy of this subpœna, and further executed May 14, 1907, by delivering in person to Henry C. Stuart at the office of the State Corporation Commission of Virginia in the City of Richmond, Virginia, a true copy of this subpœna and delivering to each of the above named persons at the time above stated, in person a certified copy of the Bill of Complaint filed in this cause.

MORGAN TREAT,
United States Marshal.

95 *Special and Limited Appearance for Defendants.*

Filed June Rules, Monday, June 3rd, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,

versus

BEVERLEY T. CRUMP, HENRY C. STUART, and JOSEPH E. WILLARD, Individually, and as Constituting the State Corporation Commission of Virginia, and R. T. WILSON, Clerk of the State Corporation Commission of Virginia, Defendants.

Special and Limited Appearance at Rules for Defendants on the First Monday in the Month of June, 1907.

I, the undersigned, an attorney-at-law, hereby appear for, and on behalf of, the defendants in the above named cause for the purpose of objecting to the jurisdiction of this Court to entertain the said cause, or to make any order therein against the said defendants, or any of them, and for that purpose alone. This appearance is limited and made specially and solely for the purpose of objecting to the jurisdiction of this Court in said cause, and for no other purpose whatsoever.

WILLIAM A. ANDERSON,
Solicitor and Counsel for said Defendants.

96 *Joint and Separate Answer of Defendants to Rule to Show Cause Why a Temporary Injunction be Not Awarded.*

Filed June 27th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,

v.

BEVERLEY T. CRUMP, H. C. STUART, and JOSEPH E. WILLARD (Individually and as Constituting the State Corporation Commission of Virginia) and R. T. WILSON (Clerk of the State Corporation Commission), Defendants.

Joint and Separate Answer of said Defendants to a Rule to Show Cause Why a Temporary Injunction be Not Awarded.

The joint and separate answer of the above named defendants to a rule, heretofore awarded in this cause and duly served upon
97 them, requiring them, and each of them, to show cause, before this court, in the United States court-room at Asheville, North Carolina, at 10 o'clock a. m., on the 27th day of June, 1907, why an injunction *pendente lite*, as prayed in the bill of the above named plaintiff, should not be issued.

These respondents (saving and reserving to themselves, jointly and separately, the right to all just and proper exceptions and defenses

which they, or any of them, have, or may have, to this cause, either as to the form or as to the substance thereof, and without waiving any valid objection, or objections, which they, or any of them have, or may have, to the jurisdiction of this Honorable Court in this cause, but, on the contrary, expressly denying any such jurisdiction), for answer to said Rule, say:

First. That said city of Asheville, in the State of North Carolina, was and is beyond the territorial jurisdiction of this Honorable Court; and, therefore, as said defendants are advised and respectfully insist, this Honorable Court cannot lawfully assemble, convene, sit, receive or hear answers, motions or pleadings of the litigants in this cause, nor take any action whatever therein, at the said city of Asheville, and that this Honorable Court, and each of the Honorable Judges thereof, was and is without jurisdiction to issue said Rule, or any Rule whatsoever, returnable before this Honorable Court at said city of Asheville; and said defendants are advised and respectfully insist that, for these reasons, said Rule was and is void and of no effect, and that these defendants ought not, nor, ought any of them, to be held or required to further answer the same.

Second. That the said defendants, Beverley T. Crump, H. C. Stuart, Joseph E. Willard, and R. T. Wilson, have not, nor hath either of them, any personal, private or individual interest in, or connection with, the subject matter of this suit; but, on the contrary, none of them ever was interested therein, or connected therewith, except in his public and official capacity and character, as
98 follows: The said Crump, Stuart and Willard, at the time of the institution of this suit, constituted the State Corporation Commission of Virginia, a Department of the Government of that State, as hereinafter more fully set forth, and the said R. T. Wilson was the Clerk of said Commission; and it is only in their respective public and official characters or capacities as Members and Clerk of said Commission that said defendants, or any of them, ever were interested in, or connected with, the subject matter of this suit—the acts, against which an injunction is prayed for in the Bill, being acts which could not possibly be performed by said defendants, or any of them, except in their said official capacities or characters, and not otherwise. The said State Corporation Commission is one of the principal Departments of the Government of the State of Virginia, and was created and established, and its functions, powers, duties and methods of procedure prescribed and provided for, by the Constitution and Statutes of said State, as will more fully appear from the One Hundred and Fifty-fifth Section, and the One Hundred and Fifty-sixth Section of the Constitution of the said State, and from the Act of the General Assembly of said State, entitled:

"An Act to put into effective operation the provisions of the Constitution relating to the creation, appointment, and organization of the State Corporation Commission, its jurisdiction, powers and duties; the qualification of its members and officers thereof, their appointment and salaries; the location of its offices and places and times of its public sessions; *its writs, processes, orders, findings and judgments; appeals from its orders, findings, and judgments and its expenses, &c.*",

which was approved April 15th, 1903; of which said constitutional provisions and statute, complete copies, duly certified by the Secretary of the Commonwealth of Virginia, under the Lesser Seal of said Commonwealth, are filed, and prayed to be taken and read
99 by this Honorable Court, along with, and as parts of, this answer, said copies being marked, respectively, "Defendants' Exhibit No. 1", and "Defendants' Exhibit No. 2". The said constitutional provisions and statute, as set forth in said copies thereof, together with two other statutes of said State, of which true copies, similarly certified, are herewith filed, marked respectively, "Defendants' Exhibit A", and "Defendants' Exhibit B", and prayed to be taken and read as parts of this answer, are (as set forth in said certificates of the Secretary of the Commonwealth attached to said copies) still in full force and effect, and have been so continually since prior to January 1st, 1904, and these defendants aver that they represent the entire constitutional, and statutory, provisions of the State of Virginia on the subject, in effect from January 1st, 1904, to the present time. From these constitutional, and statutory, provisions it will clearly appear, as these defendants respectfully submit, that (except in certain cases of mandamus or prohibition) said State Corporation Commission has no more power, under the laws of Virginia, of suing or being sued, or of pleading or of being impleaded, in any court of law or chancery, than has the General Legislature, or Supreme Court of Appeals, of that State. In view, therefore, of the matters and things set forth and referred to in this Clause Second of their Answer to said Rule, these defendants are advised and respectfully insist, that this suit is such a suit against the State of Virginia, as this Honorable Court was, and is, without jurisdiction to entertain, or to enter any order or decree, or to take any other action therein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Third. That, in the said proceedings before the State Corporation Commission of Virginia, in which said order of April 27th, 1907, was entered, the Commonwealth of Virginia was required by law to be the plaintiff, and, as a matter of fact, was the plaintiff therein, both in form and in substance; that, by the said Constitution and laws of Virginia, an appeal can be taken from said order of
100 April 27th, 1907, to the Supreme Court of Appeals of Virginia, by the Commonwealth of Virginia, as appellant, or it can be taken by the said plaintiff herein, as appellant, in which latter case, however, it is provided and required by the said Constitution and laws of Virginia, that the said Commonwealth of Virginia must be made the appellee; and these defendants are advised and respectfully insist that this proceeding now here pending, to suspend and set aside, or, at any event, to review the said order of April 27th, 1907 (in which the Commonwealth of Virginia is plaintiff, as aforesaid, from which the said Commonwealth of Virginia may take an appeal, as aforesaid, and from which the said plaintiff herein can also take an appeal, as aforesaid, but only by making the said Commonwealth of Virginia the appellee therein), is in substance and effect such a suit against the Commonwealth of Virginia as this

Court is without jurisdiction to entertain; therefore, and for this reason also, these respondents are advised and respectfully insist that this Honorable Court was, and is, without jurisdiction to entertain this suit, or to enter any order or decree, or to take any other action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Fourth. That, on the first day of June, 1907, the said Beverley T. Crump, who, up to that time, had been a Member, and the Chairman of the said State Corporation Commission of Virginia, did (pursuant to his previous resignation) retire from said Commission and cease to be the Chairman, or a Member thereof; that, thereupon, his place as a Member of said Commission was forthwith filled by the Honorable Robert R. Prentis, who had been duly appointed, according to law, by the Honorable Claude A. Swanson, Governor of Virginia, to fill the vacancy caused by the said resignation of said defendant Crump, and who has duly qualified as a Member of said Commission according to law; that, upon so taking office as a Member of said Commission, the said the Honorable Robert R. Prentis, was, by the Members of said Commission, duly elected, according
101 to law, Chairman of said Commission, and forthwith qualified as such, since which time, to-wit, since the first day of June, 1907, the said Commission has continuously been, and still is, composed of the said the Honorable Robert R. Prentis and said defendants Stuart and Willard, as the sole Members thereof, the said Prentis being the Chairman of said Commission, as aforesaid; that said Crump, having, on June 1st, 1907, ceased, as aforesaid, to be a Member of the said Commission, has not been at any time since the 1st day of June, 1907, in any manner whatsoever, connected with said Commission, and, therefore, is no longer interested in, or in any way connected with, the subject matter of this suit; and said defendant Crump, having, by said termination of his connection with said Commission, become incapable of performing, or of, in any manner, controlling or participating in, any of the acts against which said injunction is prayed for, he is advised and respectfully insists that, in any event, this suit should be no longer maintained as to him, and that he should accordingly be hence dismissed as one of the defendants herein.

Fifth. That the said defendants have not, nor have any of them, any personal, private or individual interest in or connection with, *with* the subject matter of this suit, but are only interested therein, or connected therewith, in so far as they constitute the State Corporation Commission of Virginia and the Clerk of said Commission; that the said State Corporation Commission of Virginia was created and established, and its functions, powers, duties and procedure prescribed and provided for, by the Constitution and Statutes of said State, as will more fully appear from the One Hundred and Fifty-fifth Section, and the One Hundred and Fifty-sixth Section, of the Constitution of said State, and from the Act of the General Assembly of said State, entitled:

"An Act to put into effective operation the provisions of the Constitution relating to the creation, appointment and organization of

the State Corporation Commission, its jurisdiction, powers
102 and duties; the qualification of the Members and officers thereof, and their appointment and salaries; the location of its offices and places and times of its public sessions; *its writs, processes, orders, findings and judgments; appeals from its orders, findings, and judgments, and its expenses, &c.*."

which was approved April 15th, 1903; of which said constitutional provisions and statute, complete copies, duly certified by the Secretary of the Commonwealth of Virginia, under the Lesser Seal of said Commonwealth, are (as heretofore stated) filed, and prayed to be taken and read by this Honorable Court, along with, and as parts of, this Answer—said copies being marked, as aforesaid, "Defendants' Exhibit No. 1" and "Defendants' Exhibit No. 2," respectively; that the said constitutional, and statutory, provisions, as set forth in said copies thereof, are, together with said other two statutes of said State, of which true copies, similarly certified, are (as heretofore stated) filed with this answer, marked, respectively, "Defendants' Exhibit A" and "Defendants' Exhibit B," and prayed to be taken and read as parts of this Answer, (as set forth in said certificates of the Secretary of the Commonwealth, attached to said copies) still in force and effect, and have been in full force and effect continuously since prior to the first day of January, 1904, and these defendants aver that they represent the entire constitutional, and statutory, provisions of the State of Virginia on the subject, in effect from the first day of January, 1904, to the present time; that, on the 6th day of October, 1903, Rules of Order, Practice and Procedure before the said State Corporation Commission of Virginia were duly made and prescribed by said Commission and entered upon the records of its proceedings and printed and distributed according to law; that a full, complete and true copy of said Rules of Order, Practice and Procedure, as they have existed since the first day of January, 1904, to the present time, and still exist, duly certified by the Chairman and Clerk of said Commission under the seal of said Commission, and further veri-
103 fied by the affidavit of said R. T. Wilson, is filed, and prayed to be taken and read by this Honorable Court, along with, and as a part of, this Answer—the said copy being marked "Defendants' Exhibit No. 3"; that the proceedings before the said State Corporation Commission which are referred to in the plaintiff's Bill, and in which the said order in respect to the passenger rates of the plaintiff was entered by the said Commission on the 27th day of April, 1907, were taken and had before the said Commission in strict conformity, in every respect, with the provisions hereinbefore mentioned of the Constitution and Statutes of the State of Virginia, and with the said Rules of Order, Practice and Procedure before the said State Corporation Commission; that the initial step in said proceedings was, as set forth in the Bill herein, a Notice, of which the following is a copy:

"*Notice.*

Office of the State Corporation Commission.

RICHMOND, VA., 31*st Day of July*, 1906.

To the Several Steam Railroad Companies Doing Business in Virginia and all Persons Interested:

Take notice that the State Corporation Commission will, in the city of Richmond, on Thursday, the first day of November, 1906, at 12 o'clock, noon, in accordance with the authority conferred by the Constitution of Virginia and the statutes enacted by the General Assembly of Virginia pursuant thereto, hear and consider any objections which may be urged against a rule, regulation, order or requirement of the Commission fixing and prescribing a maximum rate of charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one railroad company, or joint transportation over the
104 lines of two or more companies; and whether the contract for transportation of a passenger or passengers be evidenced by an ordinary ticket between stations, by a mileage book or otherwise; the Commission to have, as authorized by law, the power and authority from time to time, and as often as circumstances may require, to change or revise the rate, or, by rules, regulations and requirements, to provide for the more convenient and expedient putting into effect and proper observance of said maximum rate. At the said hearing and consideration of the said maximum rate of two cents per mile, the method, time and extent of promulgation and putting into effect of the same will be heard and determined by the Commission, to the end that a maximum rate for passenger transportation may be put into effect and be made applicable to all steam railroad companies doing business in Virginia, and be properly observed by them in the transportation of passengers.

BEVERLEY T. CRUMP, *Chairman;*
H. C. STUART,
JOSEPH E. WILLARD,
Commissioners."

That said Notice was forthwith duly published according to law once a week, for four consecutive weeks, in the Times-Dispatch, a newspaper of general circulation published in the city of Richmond; that, in accordance with said Notice the said plaintiff herein appeared before the said State Corporation Commission of Virginia at the time and place fixed by said Notice, to-wit, on the first day of November, 1906, at 12 o'clock, noon, at Richmond, Virginia, and filed its Answer, a copy of which is filed with the Bill in this cause, marked "Exhibit C"; that in its said Answer, as will be more fully seen from said "Exhibit C" with the plaintiff's Bill herein, the following five grounds of defense were set up and relied upon (they being the

identical grounds (with two or three immaterial exceptions)
105 upon which the plaintiff here seeks to attack and overthrow the order of the Commission in that proceeding), to-wit:

1st. That, because of the fact that the said Corporation Commission was clothed with Legislative, Judicial and Executive powers, its dealings with the said plaintiff herein, in respect to the regulation of its rates, would not amount to *due process of law;* and that, for the same reason, said plaintiff herein, if compelled to submit to the jurisdiction of said Commission in the premises, would be denied the *equal protection of the laws;*

2nd. That, by reason of certain previous Acts of the General Assembly of Virginia, that State could not, through any instrumentality, regulate the rates of said plaintiff herein, under existing conditions, without *impairing the obligation of the State's alleged Contract with said Company;*

3rd. That *any* regulation of the intra-state passenger rates of said Company would, of necessity, amount to a regulation of the inter-state passenger rates of said Company, in violation of the *Commerce Clause* of the Constitution of the United States;

4th. That the suggested rate would, if imposed upon the Company, be *confiscatory of its property;* and

5th. That the existing rates of the Company were *fair and reasonable.*

That, thereupon, the said Commission entered into a most elaborate consideration and investigation of each of the questions of law and of fact raised by said Notice and said Answer; that, as will more fully appear by the affidavit of the said R. T. Wilson, Clerk of said Commission, herewith filed, and prayed to be
106 taken and read by this Honorable Court along with, and as a part of this Answer, marked "Defendants' Exhibit No. 4," the Commission spent many days in the hearing of the matters involved in said Notice and Answer, at which hearing the said complainant herein appeared and made an elaborate defense, introducing testimony covering several thousand pages of record; that said hearing was not concluded until the said plaintiff herein had, through its counsel, announced that its case was complete; that, after the said hearing had concluded, to-wit, on the 27th day of April, 1907, said State Corporation Commission entered its order in said proceedings fixing the maximum rates of the said plaintiff herein for the transportation of passengers in its intra-state Virginia business, which order is set out at length in the plaintiff's Bill, but, at the time of entering said order, and along with the same, and as a part of the official and legal record of said proceedings, the said Commission filed an elaborate opinion which thereby became, and was, and still is (in accordance with law), a part of the official record of said proceedings, a true copy of which opinion will be found in the copy of said official record hereinafter filed, marked "Defendants' Exhibit No. 5," and is prayed to be taken and read by this Honorable Court, along with, and as a part of this Answer; that, in accordance with the requirements of law, and of the uniformly established custom and practice in all such cases, a written record of all the proceedings (except the evidence) in said matter, from its incep-

tion up to and including said order of April 27, 1907, was duly made in the regular official "judicial order book" of the Commission by its Clerk and signed by its Chairman in exactly the same manner in which records of their proceedings are made, verified and preserved by the ordinary judicial courts of the State of Virginia; that the said "judicial order book" of the Commission and its contents are public records under the laws of Virginia just as are the order books of ordinary judicial courts of that State—said record, however, in its present shape does not now include the evidence in the cause,

107 but all the documents and all oral testimony (of which latter a complete stenographic report is preserved by the Commission) constituting such evidence *is* in the custody of the Commission, and preserved by it to be hereafter made a part of the record and as such to be duly certified by the Commission along with the other parts of the record, to the Supreme Court of Appeals of Virginia, upon the taking of an appeal from said order of April 27, 1907, in case such appeal be taken; that a complete and true copy of the record of said proceedings, as it appears upon said judicial order book of the Commission (verified by the affidavit thereto attached of said R. T. Wilson, Clerk of said Commission) is herewith filed, marked "Defendants' Exhibit No. 5," and is prayed to be taken and read by this Honorable Court along with, and as a part of, this Answer; that, as above stated, all of the documentary evidence, and a full stenographic report of all the oral testimony adduced in said proceedings—amounting to several thousand pages—*is* preserved by the Commission in its archives ready to be made a part of the record of said proceedings and certified as such, by the Commission, according to law, along with the residue of the record of the case, to the Supreme Court of Appeals of Virginia, upon an appeal to that tribunal from the said proceedings before said Commission, including its said final order therein of April 27, 1907, which appeal, either the Commonwealth, or said plaintiff Company herein, may, as aforesaid, under the express provisions of the laws of Virginia, take as of right, but which neither has yet taken nor applied for; and said defendants say that the said State Corporation Commission of Virginia was, and is, and always has been (particularly with respect to the said order of April 27, 1907, and the said proceedings in which said order was entered), a "court" of the State of Virginia, within the true meaning, purport, intent and purview of Section 720 of the Revised Statutes of the United States, which provides, that,

"A writ of injunction shall not be granted by any court of the United States to stay proceedings in *any* court of a State, ex-

108 cept in cases where such injunction may be authorized by any law relating to proceedings in Bankruptcy";

and that this suit is not a case within the exception specified in the said Section 720 just quoted. Therefore, and because of the matters and things set forth or referred to in this Fifth Clause of this Answer, these defendants are advised and respectfully insist that this Honorable Court is without any jurisdiction to entertain this suit, or to enter any decree or order, or to take any other action, herein (save to dismiss the suit), because, as these defendants insist the sole

object of this suit, and the sole ground upon which the equitable interference of this court is prayed, is the obtaining of an injunction which, if obtained, would be, (as these defendants are advised and respectfully insist) in violation of the express provisions of the said statute of the United States last above mentioned; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer in this cause;

Sixth. That, under the Constitution and laws of the State of Virginia, as set forth in the Exhibits herewith filed, the State Corporation Commission of Virginia is expressly made a judicial court for the enforcement, by its own appropriate process, of compliance with the requirements of its said order of April 27th, 1907; and it is not requisite, necessary nor appropriate for the said Commission to bring suit, nor has it the power of suing, in any other tribunal, for the enforcement of any of its orders, nor is the said Commission, in the supervision, regulation or control of Railroad Companies, authorized, to prosecute or defend litigation of any kind, in any tribunal, for any purpose. Therefore, and for this reason also, these defendants are advised and respectfully insist that the injunction prayed for in the plaintiff's Bill to restrain the said Commission and its members from taking any steps to enforce the said order of April 27th, 1907, would, if granted, have only the effect of restraining and enjoining a judicial court of the State of Virginia from en-
109 forcing by its own appropriate process, compliance with an order theretofore issued by it within the limits of its jurisdiction, and from which no appeal lies to this court, and over which this court has no power of review; these respondents, therefore, respectfully insist that this Court was, and is, without jurisdiction to entertain this suit, or to enter any order or decree, or to take any other action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Seventh. That no persons are, or can be, impleaded in this cause with whom the plaintiff herein may legally or properly litigate the question of the reasonableness or validity of the rates imposed upon the plaintiff by said order of April 27th, 1907. These defendants have not, nor have any of them, any personal, private, or individual interest in that question, which would authorize them as individuals to litigate the same, nor are they, or any of them, by law, charged with the duty, or clothed with the power, in any official or public capacity or character, of conducting or defending any such litigation in any court whatsoever; the said State Corporation Commission, as a public body, in the exercise of its power under said constitutional provisions, is wholly without any power or authority of law to prosecute or defend suits, actions, or proceedings of any kind, or to appear as a suitor for any purpose, in any court whatsoever,—as much so as is the Supreme Court of Appeals, or the General Assembly, of Virginia; and, finally, the Commonwealth of Virginia has not consented to be impleaded in this Honorable Court for the purpose of litigating the question of the reasonableness or legality of the said rates prescribed by the said order of April 27th, 1907. Therefore, for this reason also, these defendants are advised

and respectfully insist, that this Honorable Court is without jurisdiction to entertain this suit, or to enter any order or decree, or to take any further action therein, except to dismiss the same;
110 and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Eighth. That before said hearing was concluded by said Commission in said proceedings, to-wit, on March 16th, 1907, the Commission gave a written notice to each of the counsel, of record in said proceedings, for the Railroad Companies which had appeared therein, including the plaintiff herein, said notice being in the form of a letter addressed by said Commission to each of said counsel by name, of the body of which letter the following is a copy:

"GENTLEMEN: We are addressing this communication to all the counsel of record in the proceedings before the Commission against the steam railroads of the State, relative to prescribing a maximum passenger rate of two cents per mile, in order to notify all counsel as follows: This proceeding will be called on Wednesday, the 27th inst. at eleven o'clock in the morning, in the court room of the Commission, at which time the hearing will be resumed and continued until completed. Counsel for the Commonwealth will be expected to be fully prepared to submit to the Commission all evidence, oral or documentary, which they may desire to put in on behalf of the Commonwealth. The defendant railroad companies will be expected to be prepared to put in any further evidence, or bring before the Commission any further fact which they may desire the Commission to consider in this proceeding. At the close of the evidence on both sides, the Commission will be prepared to hear argument on the issues arising in this proceeding, to the end that, at the sitting of the Commission, commencing on the 27th day of March, this proceeding will be carried on consecutively from day to day until concluded and submitted to the Commission for its consideration and action."

111 That accordingly, on March 27th, 1907, the Commission again assembled in public session for the final hearing of said proceeding, and after the Chairman of the Commission had read aloud at said session of the Commission, the above notice, the further taking of evidence in said proceeding was resumed, and the hearing by the Commission was not concluded until the counsel for the said plaintiff herein had announced that his client had nothing more to say or offer in its behalf; and these defendants are advised and respectfully insist, that whether the said State Corporation Commission of Virginia be regarded as a judicial, a legislative or an administrative tribunal, or as a combination of any two or more of such bodies, yet the said proceedings, which resulted in the said order of April 27th, 1907, and which are the regular proceedings prescribed by the Constitution and laws of the State of Virginia and the regularly established practice of the said Corporation Commission in all such cases, constituted due process of law as to the said plaintiff herein, within the true intent and meaning of the Fourteenth Amendment of the Constitution of the United States; and these respondents are further advised and respectfully insist that the said plaintiff herein, having been duly made a party to said proceedings,

and having appeared and made therein a full defence and submitted the matter to the Commission for its decision and action (as, these defendants aver, the said plaintiff herein did do), and the said Commission, having, thereupon, decided the questions involved in said proceedings and so submitted to it for decision, and having taken action upon the matter as set forth in its said order of April 27th, 1907, the said plaintiff herein thereupon became, was, and is, bound by that decision and action of the Commission and cannot now ignore nor disregard the same, but must appeal from it in the manner provided by law, or else abide by, and obey, it; and these defendants are further advised and respectfully insist, that this Honorable Court, being without jurisdiction to entertain an appeal from said order of April 27th, 1907, is equally without jurisdiction to ignore,
112 disregard, reverse, or overrule the same, and that to enjoin the enforcement of that order by the tribunal which entered it and which, by the laws of Virginia, is alone charged with the enforcement of that order, is tantamount to, and in substance, and effect, the same as, to ignore, disregard and overrule that order; and these defendants aver that every question of law or fact involved in this suit (except only the question of the jurisdiction of this Court) was directly involved in the said proceedings before said Commission, which culminated in said order of April 27th, 1907, and that (with two or three immaterial exceptions) every such question was expressly raised and pressed in the said proceedings by said plaintiff herein, and was considered and decided, expressly or by necessary implication, by the said Commission in the said proceedings; and these defendants aver that there was no evidence, or defence, or right, or matter, of any kind (whether legal or equitable, whether depending upon questions of law or of fact, or both, and whether arising under the Constitution and laws of the United States or otherwise), which the plaintiff herein could assert or rely upon in its behalf in this suit (if it should be proceeded with as prayed for in the plaintiff's Bill), that the said plaintiff herein did not have both the express and plain legal right to introduce and rely upon, and the fullest and fairest opportunity of introducing and relying upon, in its behalf, throughout said proceedings before said Commission which culminated in said order of April 27th, 1907, of which opportunity the said plaintiff herein most freely availed itself, without limitation or hindrance; and these defendants say, that if this suit could legally proceed, its future proceedings would and could be nothing else than a repetition of exactly the same hearing already had, upon the same evidence already adduced, and upon the same questions already decided, in said proceedings before said Commission culminating in said order of April 27th, 1907; and these defendants further aver, that the Constitution and laws of the State of Virginia make full, ample and liberal provision for an appeal of right by the said plaintiff herein, to the Supreme Court of Ap-
113 peals of Virginia, from the said decision and action of the said State Corporation Commission, and for the suspending of the operation of said order of April 27th, 1907, pending the decision of such an appeal; yet these defendants say, that the said plaintiff herein has not taken, nor applied for, any such appeal, although

there is nothing whatever to prevent, hinder, delay, or obstruct its applying for and obtaining such an appeal and in addition thereto, a supersedeas (for which, ample and liberal provision is also made by law) suspending the operation of such order pending the decision of such appeal; and these defendants are advised that, if, upon the decision of any such appeal, the said Railway Company considers that any of the rights secured to it under the Constitution and laws of the United States have been ignored or violated, or that any question, arising under the Constitution and laws of the United States and involved in said proceedings or appeal, has been erroneously decided to its detriment, by the said Supreme Court of Appeals of Virginia upon such appeal, then, and in that event, the Constitution and laws of the United States provide a plain, simple, adequate, perfect and complete remedy for the said plaintiff herein, in the form of an appeal to the Supreme Court of the United States from any such adverse decision by the said Supreme Court of Appeals of Virginia upon such appeal from the said Corporation Commission; therefore, and for these reasons also, these respondents are further advised and respectfully insist that this Honorable Court is without jurisdiction to entertain this suit, or to enter any order or decree, or to take other action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Ninth. That the said proceedings before the State Corporation Commission of Virginia, in which said order of April 27th, 1907, was entered, are not yet completed, but are still pending before that body; and these defendants are advised and respectfully insist that if said Commission be considered and treated as a court, within
114 the purview of said Section 720 of the Revised Statutes of the United States, then, and in that event, this Court is, as hereinbefore pointed out, without jurisdiction to entertain this suit, or to grant said injunction prayed for in the Bill of the plaintiff herein; and that if, on the other hand, the said Commission be regarded and treated as a legislative body, then, and in that event, this Court is equally without jurisdiction to enjoin the proceeding of such a body in the course of the enactment of a rate regulation, until such enactment is completed; and these defendants aver that, under the Constitution and laws of Virginia, the rate regulation set forth in said order of April 27th, 1907, is not a completed enactment and will not be, unless and until the publication thereof, as directed by said order, is completed, such publication being a part and parcel of the proceedings necessary for the complete enactment of the said rate regulation; therefore, and for these reasons also these defendants are advised and respectfully insist, that this Honorable Court was, and is, without jurisdiction to entertain this suit or to enter any order or decree, or to take any other action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that th-y ought not to be held or required to further answer the same.

Tenth. That the said proceedings before the State Corporation Commission, which culminated in, and included, said order of April 27th, 1907, were and are exactly the same, both as to the tribunal, and as to the methods and forms involved, as are applicable, under

the laws of that State, to all cases of a similar character, and were not different in any respect in the case of the plaintiff herein, than they were, are, and would be, under the laws of Virginia, in the case of any and every other railroad company in the State of Virginia whose rates are sought or attempted to be regulated by law; wherefore, these defendants are advised and respectfully insist that neither in the said proceedings, nor in any of them, was the said plaintiff herein denied the equal protection of the laws.

115 *Eleventh.* That, under the Constitution and laws of Virginia, as set forth in the Exhibits filed with this Answer, the plaintiff herein has a plain, complete, prompt and adequate remedy at law for the matters of which it complains in this Bill, in this, that under the said Constitution and laws, the plaintiff herein is given an appeal as of right from the said order of April 27th, 1907, to the Supreme Court of Appeals of Virginia, and is also given the right to have the operation of said order appealed from suspended, pending the decision of said appeal; and, under the Constitution and laws of the United States, the said plaintiff herein is given the further right of an appeal to the Supreme Court of the United States from any adverse decision of the said Supreme Court of Appeals of Virginia in such matters, upon any question arising under the Constitution and laws of the United States. Therefore, and for this reason also, these defendants are advised and respectfully insist, that this Honorable Court was, and is, without jurisdiction to entertain this suit or to enter any order or decree, or to take any action herein, except to dismiss the same; and these respondents, therefore, respectfully insist that they ought not to be held or required to further answer the same.

Twelfth. That, as will be clearly seen from the constitutional and statutory provisions on the subject hereinbefore set forth and referred to, the State Corporation Commission of Virginia is radically and essentially different, in its character and constitution from the Railroad Commissions (under whatsoever name designated) of any other State in the Union, and from the Interstate Commerce Commission, and therefore the rules and principles of law applicable to injunctions granted by Federal Courts against regulations promulgated by the Railroad Commissions of other States, or to proceedings therein upon regulations prescribed by the Interstate Commerce Commission, can have no proper application to this case. The principal characteristic peculiar to the State Corporation Commission of Virginia is this, that it is, by the Constitution of that State, clothed

116 with all the powers, and endowed with the full nature, of an ordinary judicial court, although it has other powers and functions in addition thereto; it sits in a fixed and public place; it keeps a written public record of its proceedings, which has all the characteristics of a court record; it issues its own writs and processes, and has them served and executed by its own executive process and not otherwise; it can compel the attendance and testifying of witnesses and the production of documents; it can enter no order nor make any valid regulation against a party without first citing it to appear and otherwise proceeding against it by due process of law; it is expressly given all the powers of a court of record; it can im-

pose fines and render, and enforce by execution, judgments therefor which are recordable, and become liens like judgments of other courts; it can issue and enforce writs of mandamus and injunction; it can punish for contempt; it can enforce its own judgments and orders by its own executive process; and not othe-wise and none of its judgments or orders can be collaterally attacked in any court of said State; from all of its judgments and orders appeals lie to the Supreme Court of Appeals of the State; but to that Court only; writs of mandamus and prohibition may be issued to it by the Supreme Court of Appeals—in short, there is not an essential characteristic of an ordinary judicial court which the State Corporation Commission of Virginia does not possess. Exactly the same due process of law which would be observed, and the same procedure which would be pursued, in an ordinary judicial court of other S-ates, or of the United States, in a suit by an ordinary Railroad Commission, or by the Interstate Commerce Commission, against a railroad company to compel the observance of an *actually promulgated* rate regulation, just *such* process is observed, and just *such* procedure pursued, by the Virginia State Corporation Commission, *in limine*, with reference to a *suggested* rate regulation, in order that its fairness and reasonableness may be judicially tested, while its wisdom and propriety is being legislatively considered, *before* its promulgation and before any injury can be done or penalty incurred, rather
117 than *afterwards*. In such a proceeding, the company has exactly the same rights and protection, and may assert and rely upon exactly the same matters of law and of fact, and upon each and every of them, that it could have asserted or relied upon before an ordinary court in a proceeding taken *after* the promulgation of the rate; and from the decision by the Commission of every *judicial* question involved in such proceeding, an appeal of right may be taken (with supersedeas, if desired) by the company affected, to the Supreme Court of Appeals of the State, and thence, upon any Federal question, to the Supreme Court of the United States. Thus it will be seen that, under the Virginia law, all questions involving the legality of a given rate regulation, are to be tried and judicially determined *before* the rate goes into effect, rather than *afterwards*, and are triable, in the first instance, by a tribunal especially suited for considering and adjudging the reasonableness of rates, the members of which tribunal are experts in such matters, rather than by an ordinary judicial tribunal, whose machinery was not designed for such work, and whose judges and masters in chancery rarely, if ever, have occasion to consider such matters. After this *nisi prius* trial, the proceedings in Virginia are the same as elsewhere, that is to say, that the opportunity for appeal from the decision of such *nisi prius* court, upon any judicial question, to the Supreme Court of the State, and thence, upon any Federal question, to the United States Supreme Court, is, in Virginia, the same as, or rather more liberal than, elsewhere. The *nisi prius* proceedings in Virginia are none the less judicial proceedings because they are conducted before a tribunal especially constituted, and peculiarly fitted, for considering and disposing of such matters—its proceedings partaking, in every particular, of all the essential elements of due process of law.

For all of the foregoing reasons, these defendants are advised and again respectfully insist, that this Honorable Court is without jurisdiction to entertain this suit, or to enter any judgment or order, or to take any other proceedings herein except to dismiss the same;
118 wherefore, these defendants respectfully pray that this suit be dismissed, and that they be allowed to go hence without day, and to recover their costs against the plaintiff herein.

BEVERLEY T. CRUMP,
H. C. STUART,
JOS. E. WILLARD,
By Counsel.
R. T. WILSON.

WILLIAM A. ANDERSON,
A. CAPERTON BRAXTON,
p. d.

119 STATE OF VIRGINIA,
City of Richmond, To-wit:

This day Beverley T. Crump, to me personally known, appeared in person before me, the undersigned, a Notary Public in and for the City aforesaid, in the State of Virginia, and, before me, in my said City, subscribed his name to the foregoing answer, and made oath, then and there, that all of the statements of fact contained in said answer are true, of his own knowledge, except as to those matters therein stated on information and belief, and, as to these matters, he believes them to be true.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this, the 20th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

120 DEFENDANTS' EXHIBIT A.

(Section 19 of Chapter II of An Act Concerning Public Service Corporations, Approved January 18th, 1904.)

19. Any person or corporation aggrieved by anything done or omitted in violation of any of the provisions of this act, by any public service corporation chartered or doing business in this State, shall have the right to make complaint of the grievance and seek relief by petition against such public service corporation before the State Corporation Commission, sitting as a court of record. If the grievance complained of be established, the State Corporation Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same and to enjoin obedience to the requirements of this act, and the said commission, sitting as a court of record, shall also have jurisdiction, by mandamus, to compel any public service corporation to observe and perform any public duty imposed upon public service corporations by the laws of this Commonwealth, subject as to

any matter arising under this section to the right of appeal to the Supreme Court of Appeals by either party as of right in the mode prescribed by law, but nothing in this section shall be construed to confer any power upon the State Corporation Commission which is forbidden to the courts by section twelve of Chapter four of this act.

COMMONWEALTH OF VIRGINIA:

I, D. Q. Eggleston, Secretary of the Commonwealth of Virginia, and Keeper of the Seals thereof, do hereby certify that the foregoing is a true copy of section nineteen of Chapter II. of an act of the General Assembly of Virginia, entitled "An act concerning Public Service Corporations," approved January 18th, 1904, as the same is published according to law; that said section of said act is still in full force and effect, and has been so continuously since the last-mentioned date.

121 Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this 25th day of June, in the year of our Lord, nineteen hundred and seven.

[Lesser Seal of the Commonwealth.]

D. Q. EGGLESTON,
Secretary of the Commonwealth and Keeper of the Seals.

122 DEFENDANTS' EXHIBIT B.

AN ACT

To require the State Corporation Commission to fix and prescribe storage, demurrage and car service charges which may be collected by railroad and other transportation companies on freight transported, or to be transported by them, and to be paid by them on freight delayed and cars not promptly furnished or placed by them, with rules and regulations governing same.

Approved May 16, 1903.

1. Be it enacted by the general assembly of Virginia, That from and after the passage of this act power is hereby conferred on the State Corporation Commission of the State of Virginia, and it is required to fix and prescribe a schedule of rates for storage of freight in depots and for demurrage or car service on freight in carload lots, to be charged by railroad and other transportation companies doing business in this State, and to fix the time after the reception of freight at destination at which such charges of storage, demurrage, or car service shall begin, with power to vary the same according to the value and character of the freight stored, the nature of the place of destination, the residence of the consignee, and such other facts as, in its judgment, should be considered in fixing the same.

2. That the State Corporation Commission shall fix and prescribe a schedule of detention charges to be paid by railroad and other

transportation companies to the consignee in case of delay in the delivery of freight in carloads or less at destination, or where shipments are held an unreasonable length of time at the station or siding at which they originate, or at any intermediate point, and for carrying freights, express packages, and all other effects by and beyond the place of final destination, without authority from the consignee; and the commission shall also fix and prescribe rules and regula-
123 tions covering the placing of empty cars and a schedule of detention charges to be paid by railroad companies to consignors when cars are not placed for loading in accordance with said rules and regulations after application has been made therefor, when said charges shall, when paid, be in full of any and all claims for damages growing out of such failure: provided, however, that the owner of the freight may, at his election, waive said charges and elect to claim such actual damage as he may have sustained instead of such charges.

3. This act shall be in force from its passage.

COMMONWEALTH OF VIRGINIA:

I, D. Q. Eggleston, Secretary of the Commonwealth of Virginia, and Keeper of the Seals thereof, do hereby certify that the foregoing is a true copy of an act of the General Assembly of Virginia, bearing the title set forth in the caption to the foregoing copy,—approved May 16, 1903,—as the same is published according to law; that said act is still in full force and effect, and has been so continuously since the last-mentioned date.

Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this 25th day of June, in the year of our Lord, nineteen hundred and seven.

[Lesser Seal of the Commonwealth.]

D. Q. EGGLESTON,
Secretary of the Commonwealth and Keeper of the Seals.

124 DEFENDANTS' EXHIBIT NO. 1.

(Sections 155 and 156, Virginia Constitution.)

SEC. 155. A permanent commission, to consist of three members, is hereby created, which shall be known as the State Corporation Commission. The commissioners shall be appointed by the Governor, subject to confirmation by the General Assembly in joint session, and their regular terms of office shall be six years, respectively, except those first appointed under this Constitution, of whom, one shall be appointed to hold office until the first day of February, nineteen hundred and four, one, until the first day of February, nineteen hundred and six, and one, until the first day of February, nineteen hundred and eight. Whenever a vacancy in the commission shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term, subject to confirmation by the General Assembly as aforesaid. Commissioners appointed for regu-

lar terms shall, at the beginning of the terms for which appointed, and those appointed to fill vacancies shall, immediately upon their appointments, enter upon the duties of their office; but no person so appointed, either for a regular term, or to fill a vacancy, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment, or adjourned *sine die* without confirming the same, nor shall he be eligible for re-appointment to fill the vacancy caused by such refusal or failure to confirm. No person while employed by, or holding any office in relation to, any transportation or transmission company, or while in any wise financially interested therein, or while engaged in practicing law, shall hold office as a member of said commission, or perform any of the duties thereof. At least one of the commissioners shall have the qualifications prescribed for judges of the Supreme Court of Appeals; and any commissioner may be impeached or removed in the manner provided for the impeachment or removal of a judge of said court.

The commission shall annually elect one of their members
125 chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed, and subject to removal, by the commission. It shall prescribe its own rules of order and procedure, except so far as the same are specified in this Constitution or any amendment thereof. The General Assembly may establish within the department, and subject to the supervision and control, of the commission, subordinate divisions, or bureaus, of insurance, banking or other special branches of the business of that department. All sessions of the commission shall be public, and a permanent record shall be kept of all its judgments, rules, orders, findings and decisions, and of all reports made to, or by, it. Two of the commissioners shall constitute a quorum for the transaction of business, whether there be a vacancy in the commission or not. The commission shall keep its office open for business on every day except Sundays and legal holidays. Transportation companies shall at all times transport, free of charge, within this State, the members of said commission and its officers, or any of them, when engaged on their official duties. The General Assembly shall provide suitable quarters for the commission and funds for its lawful expenses, including pay for witnesses summoned, and costs of executing processes issued, by the commission of its own motion; and shall fix the salaries of the members, clerks, assistants and subordinates of the commission and provide for the payment thereof; but the salary of each commissioner shall not be less than four thousand dollars per annum. After the first day of January, nineteen hundred and eight, the General Assembly may provide for the election of the members of the commission by the qualified voters of the State; in which event, vacancies thereafter occurring shall be filled as hereinbefore provided, until the expiration of twenty days after the next general election, held not less than sixty days after the vacancy occurs, at which election the vacancy shall be filled for the residue of the unexpired term.

SEC. 156. (*a*) Subject to the provisions of this Constitution and
to such requirements, rules and regulations as may be pre-
126 scribed by law, the State Corporation Commission shall be the department of government through which shall be issued all

charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State. The commission shall prescribe the forms of all reports which may be required of such corporations by this Constitution or by law; it shall collect, receive, and preserve such reports, and annually tabulate and publish them in statistical form; it shall have all the rights and powers of, and perform all the duties devolving upon, the Railroad Commissioner and the Board of Public Works, at the time this Constitution goes into effect, except so far as they are inconsistent with this Constitution, or may be hereafter abolished or changed by law.

(*b*) The commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in
127 this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company. Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable op-

portunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length, for the time and
128 in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws: provided, however, that nothing in this section shall impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons.

(*c*) In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness or reasonableness of the order or re-
129 quirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The commission may be vested with such additional

powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the commission, within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed, or authorized, by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the commission, shall be a separate offence: provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liabilities to fines or penalties.

(*d*) From any action of the commission prescribing rates, charges of classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in subsection (*c*) of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges or classifications of traffic, schedule, facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action or (if allowed by law) by the Commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts, except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the Commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws, provide for appeals from any other action of the commission, by the Commonwealth or by any person interested, irrespective of the amount involved. All appeals from the commission shall be to the Supreme Court of Appeals only; and in all appeals to which the Commonwealth is a party, it shall be represented by the Attorney-General or his legally appointed representative. No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have juris-

diction to review, reverse, correct or annul any action of the commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, however, that the writs of *mandamus* and prohibition shall lie from the Supreme Court of Appeals to the commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer.

(*e*) Upon the granting of an appeal, a writ of *supersedeas* may be awarded by the appellate court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the appellate court, no action of the commission prescribing or affecting rates, charges or classifications of traffic of any transportation or transmission com-
131 pany shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceedings resulting from such appeal, until a suspending bond shall first have been executed and filed with, and approved by, the commission (or approved on review by the Supreme Court of Appeals), payable to the Commonwealth, and sufficient in amount and security to insure the prompt refunding, by the appealing corporation to the parties entitled thereto, of all charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the court on appeal. The commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any *supersedeas*), of the order or requirement appealed from, to keep such accounts, and to make to the commission, from time to time, such reports, verified by oath, as may, in the judgment of the commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the commission appealed from, together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company pending the appeal be not sustained on such appeal; and the commission shall also, from time to time, require such company, under like penalty, to give additional security on, or to increase, the said suspending bond, whenever, in the opinion of the commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid. Upon the final decision of such appeal, all amounts which the appealing company may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the company to the parties entitled thereto, in such manner, and through such methods of distribution, as may be prescribed by the commission, or by law. All such appeals affecting rates, charges of classifications of traffic, shall have precedence upon the docket of the appellate court, and shall be heard and disposed of promptly by the court, irrespective of its place of session,
132 next after the *habeas corpus*, and Commonwealth's, cases already on the docket of the court.

(*f*) In no case of appeal from the commission shall any new or additional evidence be introduced in the appellate court; but the chairman of the commission, under the seal of the commission, shall certify to the appellate court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission as may be selected, specified and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify. The commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the appellate court, upon disposing of the appeal. The appellate court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the commission appealed from as well as any other matter arising under such appeal: provided, however, that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct; but the court may, when it deems necessary, in the interest of justice, remand to the commission any case pending on appeal, and require the same to be further investigated by the commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the commission by any party in interest), before the appeal is finally decided.

(*g*) Whenever the court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such order as, in its opinion, the commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid.

133 Such substituted order shall have the same force and effect (and none other) as if it had been entered by the commission at the time the original order appealed from was entered. The right of the commission to prescribe and enforce rates, charges, classifications, rules and regulations, affecting any or all actions of the commission theretofore entered by it and appealed from, but based upon circumstances or conditions different from those existing at the time the order appealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the commission, prescribing or altering such rates, charges, classifications, rules or regulations, shall be retroactive.

(*h*) The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit or motion against any transportation or transmission company, for a- claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the commission; but, in no such

proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the commission, within the scope of its authority, and then in force, be questioned: provided, however, that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof.

(*i*) The commission shall make annual reports to the Governor of its proceedings, in which reports it shall recommend, from time to time, such new or additional legislation in reference to its powers or duties, or to the creation, supervision, regulation or control
134 of corporations, or to the subject of taxation, as it may deem wise or expedient, or as may be required by law.

(*k*) Upon the organization of the State Corporation Commission, the Board of Public Works and the office of Railroad Commissioner, shall cease to exist; and all books, papers and documents pertaining thereto, shall be transferred to, and become a part of the records of, the office of the State Corporation Commission.

(*l*) After the first day of January, nineteen hundred and five, in addition to the modes of amendment provided for in Article Fifteen of this Constitution, the General Assembly, upon the recommendation of the State Corporation Commission, may, by law, from time to time, amend subsections *a* to *i*, inclusive, of this section, or any of them, or any such amendment thereof: provided, that no amendment made under authority of this sub-section shall contravene the provisions of any part of this Constitution other than the sub-sections last above referred to or any such amendment thereof.

COMMONWEALTH OF VIRGINIA:

I, D. Q. Eggleston, Secretary of the Commonwealth of Virginia and Keeper of the Seals thereof, do hereby certify that the foregoing is a true copy of sections one hundred and fifty-five and one hundred and fifty-six of the Constitution of Virginia, the original of which, by law, is in my custody; that said two sections are still in full force and effect, and have been so continuously since prior to January 1st, 1904.

Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this 25th day of June, in the year of our Lord, nineteen hundred and seven.

[Lesser Seal of the Commonwealth.]

D. Q. EGGLESTON,
Secretary of the Commonwealth and Keeper of the Seals.

135 DEFENDANTS' EXHIBIT NO. 2.

AN ACT

To put into effective operation the provisions of the constitution relating to the creation, appointment and organization of the "State Corporation Commission," its jurisdiction, powers, functions, and duties; the qualifications of the members and officers thereof, their appointment and salaries; the location of its offices, and places and times of its public sessions; its writs, processes, orders, findings and judgments; appeals from its orders, findings and judgments, and its expenses, etc.

Approved April 15, 1903.

Be it enacted by the General Assembly of Virginia as follows:

1. That as used in this act the term "corporation" or "company" shall include all corporations chartered by the acts of the General Assembly of Virginia, or under the general incorporation laws of this State, or doing business therein, and all trusts, associations, and joint-stock companies, having any powers or privileges not possessed by individuals or unlimited partnerships, and shall exclude all municipal corporations and public institutions owned or controlled by the State; the term "charter" shall be construed to mean a charter of incorporation by or under which any such corporation is formed; the term "transportation company" shall include any company, trustee, or other person owning, leasing, or operating for hire, a railroad, street railway, canal, steamboat, or steamship lines, also any freight-car company, car association or car trust, express company, or company, trustee, or person in any way engaged in business as a common carrier over a route acquired, in whole or in part, under the right of eminent domain; the term "transmission company" shall include any company owning, leasing, or operating for hire, any telegraph or telephone line; the term "public service cor-
136 poration" shall include all transportation and transmission companies, all gas, electric light, heat, and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public; the term "person" as used in this act shall include individuals, partnerships, and corporations, in the singular as well as in the plural number; the term "the commission" shall be construed to mean the "State Corporation Commission," and the word "officers," when used in connection with said commission, shall be construed to mean any clerk, bailiff, assistant, or other appointee of the State Corporation Commission.

Appointment of Members of Corporation Commission; Terms; Commission.

2. That the governor shall, at least fifteen days before the first day of February, nineteen hundred and four, and at least fifteen

days before the first day of February in each alternate year thereafter, appoint, subject to the confirmation of the General Assembly, in joint session, a citizen of this State, possessing the qualifications prescribed by the Constitution and by law to be a member of the "State Corporation Commission" (which shall be composed of three members), and whose term of office shall be that prescribed by the Constitution, and shall begin on the first day of February next succeeding his appointment and confirmation, except in the case of an appointee to fill a vacancy, or where the General Assembly fails to confirm an appointee to a full term of office before the date fixed by law for the commencement of his said term of office; in either case the term of office of any such appointee shall begin from the date of his qualification, and shall be for the unexpired portion of the term of office to which he shall be so appointed and confirmed. The members of the commission first appointed and confirmed, and those hereafter appointed and confirmed, shall hold office for the
137 respective terms for which they have been, or may hereafter be, appointed, and until their respective successors in office have been appointed, confirmed, and qualified, unless they shall sooner be removed from office as prescribed by the Constitution or by law. The governor shall commission each of the members of the commission, and said commission shall be fil-ed by the members in the office of the clerk of the commission.

Who Eligible to Serve as a Member of the Commission; Qualifications, etc.

3. That no person shall be eligible to serve as a member of the State Corporation Commission who, on the date of the commencement of his term of office, shall be employed by or hold any office in relation to any transportation or transmission company, or is in any way financially interested therein, or is engaged in the practice of law; nor shall any person be eligible to appointment as a member of the commission unless at the time of his appointment he is a qualified voter under the Constitution and laws of this State. One of the commissioners shall have the qualifications prescribed for judges of the supreme court of appeals.

Oath of Office.

4. That the members of the commission and the officers thereof, for whose appointment provision is made either by the Constitution or by law, before entering upon the discharge of the duties of their respective offices, shall, in addition to the oath prescribed by section thirty-four of the Constitution, severally take and subscribe the following oath, to-wit:

"I, —— ——, do solemnly swear (or affirm) that at the present time I am not employed by, and do not hold any office in relation to, any transportation or transmission company, and have not in any wise any financial interest in any such company, and am not engaged in the practice of law, and that during the term of my office

as — I will not either, directly or indirectly, be employed by
138 or hold any office in relation to any transportation or transmission company, or in any wise be financially interested in any such company, or be engaged in the practice of law, so help me God."

But the said additional oath shall be taken and subscribed by the first members of the commission and by the officers thereof as soon as practicable after the passage of this act.

The oaths prescribed by the Constitution and this act may be taken and subscribed before any officer authorized by the laws of this State to administer oaths, and shall be certified by such officer and recorded on the minutes of the proceedings of the commission, and then returned by its clerk as required by law as to the oaths of other State officers.

Offices of Commission to be Located in the City of Richmond; Where Notice, Writ or Process to be Returnable; When Public Sessions May be Held Elsewhere.

5. That the offices of the commission shall be located, and its public sessions, held, in the city of Richmond, and all notices, writs, and processes issued by the commission shall be made returnable to, and command the corporation or person against whom directed to appear before the commission and answer on a certain day to be named therein: provided, however, the commission may in its discretion, if public necessity or the convenience of the parties require, hold public sessions elsewhere in the State, and may order any notice, writ, or process to be made returnable to the place of any such session; and for the holding of any such session the commission may occupy the court-room of the court-house of the city or county wherein such session may be held if said court-room shall not at the time be in use for the sessions of the court of any such city or county.

Offices.

6. That the rooms in the State library building now occupied as offices by the railroad commissioner shall be the offices of the
139 commission, its clerk, bailiff, assistants, and subordinates until otherwise provided by law, and the register of the land office is hereby directed to have the said rooms fitted up in a suitable manner for the use and occupation of the commission and its officers. And the sum of five hundred dollars, or so much thereof as may be necessary, is hereby appropriated for that purpose out of any moneys in the treasury not otherwise appropriated.

Clerk, Assistant Clerk, Bailiff, Stenographer, &c., Qualifications and Terms.

7. That the commission shall have a clerk, a first assistant clerk, a bailiff, and a stenographer (who shall also be a typewriter), each of whom shall have the qualifications for office, be clothed with the power, discharge the functions and perform all the duties herein-

after prescribed, and such other duties as may be prescribed or required by the commission, and all of whom shall be appointed by the commission, and whose respective terms of office shall be as prescribed by the commission, and they shall be subject to removal by the commission as hereinafter in this act provided. The officers so appointed shall hold office until their successors have been appointed, qualified, and given bond as required by law, unless they shall sooner be removed from office, as hereinafter provided.

Officers to be Residents of the State and Qualified Voters.

8. That the officers of the commission shall at the time of their appointment be actual residents of this State, and qualified voters therein, under the Constitution and laws thereof.

The First Members of the Commission to Meet, Organize, Appoint Clerical Force, &c.; When the Commission to be Vested With Powers and Function of Office.

9. That the persons appointed, confirmed, and commissioned to be the first members of the commission under the provisions of
140 section one hundred and fifty five of the Constitution shall, as soon as practicable, meet in the office now used by the railroad commissioner and organize by taking and subscribing the oaths of office prescribed by the Constitution and by this act, and elect one of their number as chairman of the commission, appoint a clerk, a first assistant clerk, a bailiff, and a stenographer; and when organized the commission shall have all the powers, discharge all the functions, and perform all the duties prescribed by the Constitution and by law.

When the Office to Become Vacant; How Vacancies Filled.

10. That if any person heretofore or hereafter appointed and confirmed to be a member of the commission, or if any person appointed an officer of the commission, shall fail to qualify as required by the Constitution or by law, or to give any bond required by law of any such officer within thirty days after the date fixed by the Constitution or by law, as the commencement of the term of office to which he shall be appointed, then such office shall because of such failure to qualify, or to give any required bond within the time aforesaid, become vacant, and such vacancy shall, in the case of members of the commission, be filled as prescribed by section one hundred and fifty-five of the Constitution, and in the case of officers and appointees of the commission, be filled by appointment of the commission.

Duties of Clerk; Records; Certified Copies Same Legal Effect.

11. That the clerk of the commission shall keep a minute book in which shall be recorded all the proceedings, orders, findings, and judgments of the public sessions of the commission, and the minutes of the proceedings of each day's public session shall be read and approved by the commission and signed by its chairman, or acting chairman; he shall, subject to the supervision and control of the

commission, have custody of and preserve all of the records, documents, papers, and files of the commission, or which may be filed before it in any complaint, proceeding, contest or controversy,
141 and said records, documents, papers, and files shall be open to public examination in the office of said clerk to the same extent as the records and files of the courts of this Commonwealth; he shall, when requested, make and certify copies from any record, document, paper, or file in his office, and if required, affix the seal of the commission thereto, and except when made at the instance of the commission or on behalf of the Commonwealth, he shall charge and collect the same fees as are fixed by law for like services rendered by the clerks of the courts of this Commonwealth, and any such copy, so certified, shall have the same faith, credit, and legal effect as copies made and certified by the clerks of the courts of this Commonwealth from the records and files thereof; he shall certify all allowances made by the commission to be paid out of the public treasury for witness fees, service of process, or other expenses; issue all notices, writs, processes or orders awarded by the commission; or authorized by law, or by the rules of the commission; he shall receive all fines and penalties imposed by the commission, all moneys collected on judgments, all registration fees required by law to be paid by corporations, all fees collected by any officer of the commission, and the tax on the seal of the commission, and shall keep an accurate account of the same and what disposition has been made thereof, together with all fees collected by him for services rendered, either by him or his assistants, and shall, at least once in every thirty days during his term of office, render a statement of all such receipts and collections to the auditor of public accounts, and pay the same into the treasury of the Commonwealth, and shall keep all such other accounts of such collections and disbursements, and shall make all such other reports thereof as may be required by law or by the regulations prescribed by the auditor of public accounts; and generally shall have the powers, discharge the functions, and perform the duties of a clerk of a court of record in all matters within the jurisdiction of the commission.

142 Duties and Powers of First Assistant Clerk.

12. That the first assistant clerk of the commission shall have the powers, discharge the functions, and perform the duties in all matters within the jurisdiction of the commission of a deputy clerk of a court of record, and shall perform as well the duties of the clerk of the commission during the absence of said clerk, and in case of the death, resignation, incapacity, or removal from office of the clerk, he shall be the acting clerk of the commission until the vacancy in the office of clerk shall be filled.

Duties and Powers of the Bailiff.

13. That the bailiff of the commission shall, in all matters within the jurisdiction of the commission, have the powers, discharge the functions, and perform the duties of a sheriff or sergeant under the law; he shall preserve order during the public sessions of the com-

mission, and may make arrests and serve and make return on any writ or process awarded by the commission, and execute any writ, order, or process of execution awarded upon the findings or judgments of the commission in any matter within its jurisdiction.

Duties of the Stenographer, &c.

14. The stenographer and other assistants and subordinates of the commission shall perform the duties required of them by law or by the commission, under its rules, regulations, and requirements.

The Commission to Require Its Officers to Enter into Bond; Amount, Conditions, and Recordation of Same.

15. The commission shall require its clerk, first assistant clerk, and bailiff, before entering upon the discharge of the duties of their respective offices, each to enter into bond, with surety to be approved by the commission, in such penalty as the commission
143 may deem sufficient (not in any case less than five thousand dollars), conditioned for the faithful performance of the duties of their respective offices, and for the prompt and full accounting for and payment into the treasury of all moneys received by them, respectively, as officers of the commission. The said bonds shall be made payable to the Commonwealth, and may be proceeded on and enforced in any circuit or corporation court in like manner as the official bonds of other officers of this Commonwealth, or of its courts. Said bonds shall be recorded in the record of the proceedings of the commission, and the original bonds transmitted by its clerk to the auditor of public accounts, who shall file and preserve the same in his office.

Powers of the Commission.

16. The commission shall have power and authority to require, by its rules, regulations, and requirements, all corporations chartered under the laws of this State, and all foreign corporations, doing business in this State, to perform and discharge any public duty or requirement imposed upon such corporations by the Constitution, or by law, and may require all such corporations to furnish such reports to the commission as may be provided by the Constitution, or by law, and the commission may enforce against any such corporation, by its judgments and processes, any fine or other penalty imposed by law for the failure of any such corporation to perform any public duty required of it, or to comply with any requirement of law, or any lawful regulation of the commission in reference to the same. The commission may require the establishment by transportation companies of separate waiting rooms at all stations, wharves, or landings for the white and colored races.

144 Duties of the Commission with Respect to Transportation Companies, &c.

17. It shall be the duty of the commission to make inquiry and examination from time to time into the acts and proceedings of railroad, canal, steamboat, steamship, or other transportation companies, and other chartered common carriers and transmission companies, doing business in this State, their officers and agents, for the purpose of ascertaining whether anything has been done or omitted in violation or contravention of their charters, or of the law.

The Commission to Examine all Railroads, &c.

18. The commission shall examine all the railroads and the works and equipment thereof, and the works and equipment of all other transportation companies, and keep itself informed as to their physical condition and the manner in which they are operating with reference to the security and accommodation of the public, and the compliance of the several companies with the provisions of their charters and the laws of the Commonwealth. And the provisions of this section shall apply to all railroads and other transportation companies, and to the corporations, trustees, receivers, or other person owning or operating the same.

The Commission to give Notice to Transportation or Transmission Company of Violation of Law, and Compel Compliance with Same.

19. Whenever, in the judgment of the commission, it shall appear that any transportation or transmission company has violated any law of this State, or has neglected in any respect or particular to comply with the terms of its charter, or with the provision of any of the laws of the Commonwealth, it shall give notice thereof in writing to such company or the person operating the same; and if the violation or neglect be continued after such notice, the commis-
145 sion shall take such proceedings and impose such fines or penalties within its jurisdiction as shall be necessary to compel such transportation or transmission company to comply with the terms of its charter and the provisions of the laws of the Commonwealth.

The Commission to Compel Railroad to Make Repairs When Necessary; Notice; Railroad May be Heard Thereon; Penalty.

20. Whenever in the judgment of the commission it shall appear that repairs are necessary upon any railroad, or that any addition to its rolling stock, or addition or improvement in the equipment of any other transportation line, or any enlargement of or improvement in the stations or station houses, waiting rooms, wharves or landings, or any change in the mode of operating the road, or other transportation line, and conducting its business, is reasonable and expedient in order to promote the security and accommodation of the public, it shall give ten days' notice in writing to the company or person

operating the road, or other transportation line, of the improvements and changes which it adjudges to be proper, designating when and where the contemplated action in the premises will be considered and disposed of, and such company or person shall be afforded a reasonable opportunity to introduce witnesses and to be heard thereon, and any such company or person failing or refusing to obey any valid order or requirement of the commission in the premises within such reasonable time, not less than ten days, as shall be fixed in the order of the commission, it may impose upon any such company or person the fines and penalties prescribed by the Constitution and by law for its or his failure to obey the orders and requirements of the commission and the requirements of the law, and enforce the payment and collection thereof by its judgments and processes.

When Commission to Make an Examination of Road; Notice; Fines; How Same May be Enforced.

21. Upon the complaint and application of the mayor or
146 counsel of any city or town, or the board of supervisors of any county within which any part of any transportation or transmission line is located, it shall be the duty of the commission to make an examination of the physical condition and operation thereof. Before proceeding to make such examination in accordance with such application, the commission shall give to the applicants and the corporation or person operating any such line reasonable notice in writing, of the time and place of entering upon the same. If upon such examination it shall appear to the commission that the complaint alleged by the applicant is well founded, it shall so adjudge and shall notify such corporation or person of its adjudication; and if such corporation or person fail for sixty days after such notification to remove the cause of complaint, the commission shall impose the fines and penalties provided by the Constitution and by law for its failure to obey the orders and requirements of the commission, and enforce the collection thereof by its judgments and processes.

Commonwealth to be Complainant, &c.

22. That in all complaints, proceedings, contests, or controversies by or before the commission, whether instituted by the Commonwealth or by the commission of its own motion, the Commonwealth shall be complainant, and the party against whom the complaint is preferred, or the proceeding instituted, shall be the defendant. Any party complainant or defendant in any complaint, proceeding, contest or controversy shall be entitled to process, to convene parties, compel the attendance of witnesses, or the production of books and papers, in any proceeding or hearing before the commission.

Proceedings to be as in Courts of Record.

23. That the commission, on hearing of all complaints, proceedings, contests, or controversies, in which it shall be called upon to

decide or render judgment in its capacity as a court of record,
147 shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of this Commonwealth, in like manner as complainants and defendants in the courts of this Commonwealth.

Perjury.

24. That any person who shall wilfully swear falsely touching any material fact or matter in any complaint, proceeding, investigation, contest or controversy instituted or pending before the commission shall be deemed guilty of perjury.

The Commission to Cause its Rules of Procedure, &c., to be Entered of Record and Printed; Distribution of Copies.

25. That the commission shall cause its rules of order and procedure to be entered upon the records of its proceedings and to be printed, as well as all amendments and additions to the same, and shall furnish copies thereof to county and city clerks and to any citizen of this State upon application therefor.

The Commission to Summon Party Before Imposing Fine or Penalty; Contempts; Notice to be Given as to Rules or Orders Directed Against One or More Companies; General Order, Rule, &c., to be Published; Suspension of Order During Appeal; Penalties.

26. That the commission, before entering any judgment for any fine or penalty imposed by law shall summon or rule the party upon whom such fine or penalty is sought to be imposed to appear before the commission at some public session to be designated in the process, to show cause against such fine or penalty, and why the same should not be imposed and judgment rendered therefor: provided, that the provisions of this section shall not apply to contempts com-
148 mitted in the presence of the commission while in public session; and before the commission shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such order, rule, regulation, or requirement shall first be given by the commission at least ten days' notice of the time and place when and where the contemplated action of the commission in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done; and before the commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published in substance, not less than once a week for four consecutive weeks, in one or more newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such

general order, rule, regulation, or requirement made by the commission shall be published at length for the time and in the manner above specified before it shall go into effect, and shall also, as long as it remains in effect, be published in each subsequent report of the commission. Any corporation failing or refusing to obey any valid order or requirement of the commission within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission such sum, not exceeding five hundred dollars, as the commission may deem proper, or in such sum in excess of five hundred dollars as may be prescribed or authorized by law; and each day's continuance of such failure or refusal after due service upon such corporation of the order or requirement of the commission shall be a separate offense: provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed
149 against the company in the matter of its liability to fines or penalties: provided, further, that the power of the commission to impose the penalties prescribed by the Constitution, or by the law, for the failure or refusal of any corporation to obey its valid orders and requirements, shall not be construed to relieve any company or corporation from the penalties now prescribed or hereafter to be prescribed by law for the failure or refusal of any such company or corporation to perform any public duty or requirement prescribed, or which may be prescribed by any law of this State, but that such penalties may be enforced by the commission in addition to the penalties authorized to be imposed by the Constitution and by law for failure or refusal to obey any of its valid orders or requirements.

Powers of the Commission with Respect to Rendering and Enforcing Judgments, Penalties, &c., Collection and Payment of Same into the Treasury.

27. The commission shall have power and authority in all matters of which it has jurisdiction under the Constitution, or the laws of this Commonwealth, to render and enter up judgment for fines and penalties, or for the recovery of money, in any complaint, proceeding, contest, or controversy, whether instituted of its own motion or otherwise, and to issue process of execution thereon, which may be levied and executed in like manner as executions awarded and issued upon the judgments or decrees of the courts of law or equity of this Commonwealth. All judgments of the commission for fines or penalties, for contempt, or for the violation of any provision of the Constitution, or the laws of this State, or for the failure or refusal of any corporation to obey and observe the lawful rules, regulations, or orders of the commission, shall be entered up in favor of the Commonwealth, and when collected shall be paid by the clerk of the commission into the treasury, as hereinbefore provided.

150 The Commission to Have Power to Punish for Contempt by Fine or Imprisonment, &c., to the Same Extent and Manner as Courts; Commitment to Jail, &c.; Writ of Error.

28. The commission shall have powers and jurisdiction possessed and exercised under the law by the courts of record of this Common-

wealth to punish for contempt by fine or imprisonment, or by both, any person duly summoned to appear and testify before the commission who shall fail or refuse to appear and testify, without a lawful excuse, or who shall refuse to answer any proper question propounded to him by the commission in the discharge of its duty or who shall conduct himself in a rude, disrespectful, or disorderly manner before the commission, or any of them, deliberating in the discharge of duty in public session, and may, for any such contempt, impose the same penalties, either by fine or imprisonment, or by both, and render and enter up judgment in any such proceeding and enforce the same by process of execution or by commitment to jail, or by both, in the same manner and by like process and proceedings, and to the same extent, as may by law be done by any of the courts of this Commonwealth. The commission may commit any person adjudged by it guilty of contempt to the jail of any city or county in the Commonwealth, and the jailer thereof shall receive such person upon the commitment of the commission, attested by its clerk, first assistant clerk, or acting clerk, and confine such person in the jail of his city or county, as the case may be, for the term of imprisonment specified in the commitment, unless sooner discharged therefrom by due process of law. The said jailer shall receive for the board of any person so committed the same allowance made by law for other persons confined in such jail, which shall be paid out of the public treasury upon the allowance of the commission, certified as hereinbefore provided. The fines and judgments of the commission in any contempt proceeding may be reviewed, affirmed, reversed, or modified, as justice may require, on writ of error from the commission to the supreme court of appeals.

151 The Commission May Award and Issue, Serve, Execute, and Return Process, &c., and Compel Attendance of Witnesses, as Courts.

29. That the commission shall, in all matters within its jurisdiction, have the power and authority to award and issue, have served, executed, and returned, any writ, notice, process, order, or order of publication which may by law be awarded, issued, served, executed, or returned by or to any court of law or equity in this Commonwealth, for the purpose of compelling the attendance of witnesses, the production of books and papers, the convening of parties, or the enforcement and execution of its findings, orders, or judgments.

Writs, &c., to Run in the Name of the Commonwealth; by Whom Issued and Served; Fees; Duties of Bailiff; Penalty for Failure to Execute Writ, &c.

30. That all writs, processes, and orders of the commission shall run in the name of the Commonwealth, and shall be attested by its clerk, or first assistant clerk, or acting clerk, and shall be directed to its bailiff, and may be served, executed, and returned by the said bailiff, in any city or county of the State, or by the sergeant or sheriff, or any constable, of any city or county in this State within his bailiwick. All writs, notices, processes, or orders of the commission may be served, executed, and returned in like manner and upon like

persons or property as the processes, writs, notices, or orders of the courts of record of this Commonwealth, and when so served, executed, and returned shall have the same legal effect. The bailiff or other officer serving or executing any writ, notice, process, or order of the commission shall receive the same fees and commissions allowed by law for like services to the sergeants and sheriffs of the cities and counties of this State; provided, that the bailiff of the commission shall account for and pay to its clerk all fees and commissions received by him for any services which he may render, which
152 shall be accounted for and paid by the clerk of the commission into the treasury, as hereinbefore provided. The bailiff, or any other officer hereinbefore named, who shall fail to execute and return any writ, notice, process, or order of the commission shall be subject to the penalties prescribed by law for the failure to execute and return the process of any court, which penalties may be enforced by the judgment of the commission.

The Commission to Tax and Collect Like Fees and Costs as Courts; Fees and Mileage of Witnesses.

31. That the commission shall cause to be taxed and collected in all complaints, proceedings, contests, or controversies instituted or pending before it, like fees and costs taxed and collected for like services by the officers of the courts of this Commonwealth; also, the fees and mileage of witnesses attending upon its public sessions, and may enter judgment for the same and issue execution thereon, which execution may be levied and executed in like manner as execution issued upon the judgments or decrees of the courts of law or equity of this Commonwealth; provided, that no costs shall be taxed or collected against the Commonwealth except on appeals of corporations under the provisions of section one hundred and eighty of the Constitution, which have been aggrieved by the assessments and ascertainments made by the commission under sections one hundred and seventy-six and one hundred and seventy-eight of the Constitution.

Judgments of the Commission to be a Lien on Real Estate When Duly Docketed, &c.; How Enforced; Clerks to Docket Judgments Certified by the Clerk of the Commission.

32. That the judgments of the commission for the recovery of money, fines, or penalties shall be a lien on the real estate of the judgment debtor when duly docketed and indexed in the judgment lien docket as the judgments of the courts of record are required by law to be docketed and indexed, in the county or city in which
153 the real estate of the judgment debtor is located, and the lien of such judgment may be enforced in equity before any court having jurisdiction to enforce liens. The clerks of the courts of the several cities and counties shall docket all such judgments on the lien docket of their respective courts when a copy thereof, certified by the clerk of the commission, shall be presented for that purpose.

When Sessions of the Commission Public; Judgments to be Rendered in Public Session; When Judgment Effective; Number, Time and Commencement of Session; One Regular Session Every Three Months.

33. That the sessions of the commission for the hearing of any complaint, proceeding, contest, or controversy instituted or pending before it, whether of its own motion or otherwise, shall be public, and its findings, decisions, and judgments shall be announced and rendered in public session. The judgments of the commission for fines or penalties, or for the recovery of money, shall take effect as of the date of such judgment, and when allowed by the commission in its order and entered up, the judgment shall bear interest from that date. The commission may, by its rules, provide for the number of its regular public sessions in each year, the time of their commencement, their duration, and for their adjournment; and may also provide for extra or special public sessions when, in their judgment, such extra or special public sessions may be necessary or required. The commission shall hold at least one regular public session in every three months in each year.

Appeal to Supreme Court; How Taken and Perfected; to be Heard Promptly, &c.; How Section Construed.

34. That the Commonwealth or any party aggrieved by any final finding, order, or judgment of the commission shall have, of right, regardless of the amount involved, an appeal to the supreme court of appeals, same to be taken and perfected within six months from the date of such final finding, order, or judgment, and the
154 supreme court of appeals may, on petition of the attorney-general, or any other party so aggrieved, if said petition be presented within six months from the date of the final finding, order, or judgment of the commission, award a writ of supersedeas to any such final finding, order, or judgment, and may review, affirm, reverse, or modify the same, as justice may require, and enter therein such order as may be right and just. All such appeals shall be taken and perfected, heard and determined, and the mandate of the supreme court of appeals certified down to the commission in the same manner as appeals in equity causes from the circuit or corporation courts of this Commonwealth to the supreme court; except such appeals shall be heard and disposed of promptly by the supreme court, irrespective of its place of session, next after *habeas corpus* and Commonwealth's cases already on the docket; provided, however, this section shall not be construed to interfere in any way with the provisions of subsections (*d*), (*e*), (*f*), and (*g*) of section one hundred and fifty-six of the Constitution, as to appeals from the action of the commission, prescribing rates, charges, or classification of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusal to approve a suspending bond, or requiring additional security thereon, or an increase thereof; but shall be construed to provide only for appeals from the final findings, orders, and judgments of the commission in cases not expressly provided for by the Constitution.

Suspending Bond on Appeal; Costs, &c.

35. That the commission may require a suspending bond on any appeal, in such penalty and with such surety thereon as it may deem sufficient, and may during the pendency of any appeal, at any time, require the increase of any such bond or additional security thereon: provided, however, there shall be of right, regardless of the amount, an appeal from the action of the commission refusing to approve a suspending bond, or requiring an increase thereof, or additional security thereon, in like manner as provided by subsections (*d*), (*e*), (*f*), and (*g*) of section one hundred and fifty-six of the Constitution. The commission may also require bond for the payment of costs in such penalty, and with such security, as it may deem sufficient, in any complaint, proceeding, contest, or controversy instituted or pending before it. All suspending bonds, and bonds for the payment of costs, taken or required to be taken by the commission, shall be made payable to the Commonwealth, and may be enforced in the name of the Commonwealth by motion or other legal proceeding or remedy before the commission, or in any circuit or corporation court of this Commonwealth having jurisdiction of a motion or action on such bonds, and the process and proceedings thereon shall be as provided by law upon bonds of the like character required and taken by any court of this Commonwealth, and the commission or such circuit or corporation court may render and enter up like judgments upon such bonds as may, by law be rendered and entered upon bonds of like character, and process of execution shall issue upon such judgments, and may be levied and executed as provided by law in other cases.

Transportation Company upon Final Decision of Appeal to Refund Amount Collected Pending the Appeal in Excess of that Authorized; Penalty; Amount of Judgment Distributed Among Those Entitled Thereto.

36. That if any transportation company, upon the final decision of an appeal from the action of the commission prescribing rates, charges, or classification of traffic, confirming or modifying the action of the commission, shall fail to refund in the manner and within the time prescribed in the notice of the commission all amounts which the appealing company may have collected pending the appeal, in excess of that authorized by such final decision, upon notice to such corporation by the commission of such final decision, then the commission, after thirty days' notice to any such company, may, unless the amount required by such order be paid to the clerk of the commission, render and enter judgment in the name of the Commonwealth, for the use of the persons, firms, and corporations entitled to the same, against any such company for the aggregate amount of such collections and for costs, and may enforce the amount of such judgment and costs by process of execution as hereinbefore provided as to the enforcement of the judgments of the commission. The commission shall, upon the collection of said judgment, forthwith distribute the amount thereof, through its clerk, among the parties entitled thereto, respectively,

in such manner as it may by its rules or orders prescribe, and shall, upon the payment or collection of any such judgment, enter the same satisfied upon its records, and have the same entered satisfied on the judgment lien docket of the court of any city or county where the same may have been docketed, and the satisfaction of any such judgment shall be a bar to any further action or recovery against any such corporation to the extent of such recovery.

Accidents.

37. The commission may investigate the cause of any accident on any transportation line which, in its judgment, shall require investigation.

Transportation of Convicts and Insane Persons.

38. The commission is authorized to enter into contracts with the several railroads and other transportation companies, doing business in this State, for the transportation of convicts, insane, or other persons, who are cared for by the State, and of sheriffs and all necessary guards, to and from the penitentiary and the several State hospitals in this State, upon such terms as the commission and the several companies may agree, not to exceed two cents per mile for each person transported under such contract. Said contracts
157 may be renewed or extended for such time as the commission shall deem to be to the interest of the State.

The Commission to Determine the Most Direct Route, Furnish Schedules, &c., to Hospitals and Penitentiary.

39. The commission shall determine the most direct and practicable route from each courthouse by which to convey persons to the penitentiary and the several State hospitals, and shall file with the auditor of public accounts, the superintendent of the penitentiary, the superintendents of the several State hospitals, and the clerks of the several counties and corporations, a schedule of the route determined upon.

The Commission to Furnish Schedule Certificates of Transportation; by Whom Signed; How Companies May Collect on Same.

40. The commission shall furnish with such schedule certificates of transportation in the form agreed upon in its contract with the companies. Said certificates shall be signed by the clerk of the commission, and shall be taken up by the conductor or other agent authorized by said companies to collect fare, as other tickets or fares are collected. They shall be presented by the companies holding the same, either monthly or quarterly, as may be determined upon by the commission and the companies, to the auditor of public accounts, who shall examine the same, and if found correct, pay them as other claims against the State are audited and settled.

The Commission to Furnish Compilation of Statute Laws, &c., Governing Common Carriers, Distribution of Same; Rules to be Posted.

41. The commission shall, annually, on the first day of January, publish a compilation of the statute laws governing common carriers in the State of Virginia, together with a compilation of the rules and regulations prescribed for their government by the commis-
158 sion, and shall furnish a sufficient number of copies to each railroad company or transportation company, or person operating the same, to enable such company or person operating the same to post and keep posted conspicuously in every passenger and freight depot of the company, a copy of such laws, rules and regulations; and every such company, or person operating the same, is hereby required to see that such copies, when furnished by the commission, are posted and kept posted in the manner prescribed.

Seal of the Commission; to What It May be Affixed; Its Force and Effect; Fee.

42. That the commission shall have and use a common seal, to consist of a circular die with the coat-of-arms of Virginia and the title "State Corporation Commission" stamped upon the face of the die, and shall have power to affix said seal to any paper, record, or document when necessary for the purpose of authentication, and such seal, when so affixed to any paper, record, or document emanating from the commission or its clerk's office, shall have the same force and effect for authentication as the seal of any court of record in this State. The clerk of the commission shall collect a tax of one dollar for each impression of said seal upon any paper, record, or document, for which tax he shall account to the auditor of public accounts, and pay the same into the public treasury as hereinbefore provided.

Docket.

43. That the commission shall keep a docket of all complaints, proceedings, contests, and controversies instituted or pending before it, and all cases shall be numbered on the docket in the order in which they were instituted, and the papers therein jacketed and numbered in the same consecutive order, and when finally determined and disposed of, the papers and files shall be filed and preserved in the same numerical order and properly indexed for convenient future reference.

159 Allowance for Expenses, &c., to be Paid Out of the Public Treasury; Compensation, Mileage, &c., of Witness.

44. The commission shall, by order entered upon the records of its proceedings, make all allowances to be paid out of the public treasury for expenses, witness fees, and mileage, and for service of process, and when so allowed and certified by its clerk to the auditor of public accounts, the last-named officer shall draw his warrant for the payment of the amount of any such allowances out of the public treas-

ury: provided, that the commission shall not allow to any witness exceeding one dollar per day for his attendance, nor exceeding five cents per mile for each mile traveled to and from the place of attendance, and shall not make any allowances to be paid out of the public treasury save when the expenses incurred, the witness' attendance, or the services of process, is at the instance of the commission, or on behalf of the Commonwealth.

Register of Corporation; List of Charters to be Furnished by Secretary of the Commonwealth.

45. That the commission shall have made and kept in its clerk's office a register of all corporations, which register shall contain the corporate names of all corporations heretofore chartered and existing at this date, so far as the same may be obtainable, and those hereafter chartered by the laws of this State, and of all foreign corporations heretofore or hereafter licensed to transact business in this State, and as to domestic corporations shall contain also the following information, to-wit: Date of incorporation. Names and residences of officers and directors. Amount of capital stock, and whether preferred or common, or both, and the amount of each. Amount of bonds to be issued. Nature of corporate enterprise or business to be conducted. The place of its principal or general office or place of business.

The secretary of the Commonwealth shall forthwith prepare
160 and furnish to the commission a list of all charters recorded in his office up to April first, nineteen hundred and three, containing the above information so far as shown by the records of his office.

The Commission to Issue All Charters, &c., and to Certify Same under Its Seal to the Secretary of the Commonwealth: Recordation; Granting License to Foreign Corporations; Fees.

46. The commission shall issue all charters and all amendments, extensions, and renewal of charters, upon application, complying with the provisions of the incorporation laws of this State, and when any charter, or amendment, extension, or renewal of charter is issued, shall certify the same, under its seal, to the secretary of the Commonwealth for recordation as required by law, and the commission shall have the granting of all licenses to foreign corporations to transact business in this State. The commission shall, before approving any application or petition for a charter, or granting any license to any foreign corporation to transact business in this State, require the payment of the fees prescribed by law, and on or before the first day of March in each year, in addition to the franchise tax and the fees otherwise prescribed by law, require each domestic corporation, other than a purely charitable institution, and each foreign corporation doing business in this State, to pay a registration fee as follows: Where the proposed maximum capital stock is fixed at fifteen thousand dollars or under, or if such corporation is organized on a mutual basis or without capital stock, five dollars; in excess of fifteen thousand dollars and not over fifty thousand dollars,

ten dollars; in excess of fifty thousand dollars and not over one hundred thousand dollars, fifteen dollars; in excess of one hundred thousand dollars and not over three hundred thousand dollars, twenty dollars; and in excess of three hundred thousand dollars, twenty-five dollars; all of which fees shall be collected and received by its clerk and accounted for and paid into the public treasury as hereinbefore provided.

161 The Commission to Designate Depository; Deposits; Checks; Officer Collecting Judgment to Pay Same within Ten Days; Penalty.

47. That the commission shall designate some State depository as a place of deposit for the moneys received by its clerk under this or any future act of the general assembly, and shall require its clerk to deposit therein all moneys received by him at least once in every twenty-four hours, and all checks upon said depository drawn by said clerk shall be countersigned by the chairman or acting chairman of the commission. That the bailiff of the commission, or any sergeant, sheriff, or constable who shall collect any judgment, or any part thereof, rendered by the commission, shall, within ten days after such collection, pay the amount thereof, either in current funds or by certified check, to the clerk of the commission. Any officer of the commission, or any sergeant, sheriff, or constable who shall omit or fail to perform any of the requirements of this section, shall be fined not less than five hundred dollars nor more than one thousand dollars, which may be imposed and judgment rendered therefor and enforced by the commission. All proceedings against any such officer and the surety on his official bond, may be had as provided by law in reference to official bonds, for default in the accounting for, or payment over, of any moneys collected or received by him under the provisions of this act.

The Commission to Notify Corporation of the Amount of Registration Fee.

48. That the commission shall annually, on or before the first day of December, notify each corporation subject to a registration fee of the amount thereof, and when the same is payable, and when paid its clerk shall promptly receipt therefor to the corporation paying the same, such notice to be mailed to the last address furnished by such company.

162 Free Transportation to Members of the Commission.

49. That all transportation companies operating in this State shall, on the order of the commission, attested by its clerk, or on an order signed by any member of the commission, furnish free transportation to the members of the commission and its officers, when traveling on official business, and the order for such transportation shall show that the same is desired for official business.

Supplies, Printing, Expenses, &c.

50. That the commission shall have authority to purchase all necessary supplies, and to have all necessary printing and publishing done, and to secure all telephone and telegraph service necessary to the efficient discharge of its duties, and the same shall be paid out of the fund appropriated for its incidental and contingent expenses: provided, however, that all printing necessary for the commission shall be done by the public printer on its order.

Report of the Commission.

51. That the commission shall, on or before the first day of December in each year, tabulate and publish in statistical form such reports made to it in pursuance of the Constitution and laws of this State, as required by subsection (*a*) of section one hundred and fifty-six of the Constitution proper, and shall on the same date in each year, make report to the governor as required by subsection (1) of said section, to be by him laid before the general assembly at each regular session thereof.

Impeachment.

52. That any member of the commission who, during the term of his office, shall be directly or indirectly employed by, or hold any office in relation to, any transportation or transmission
163 company, or in any wise become interested therein, financially, or shall engage in the practice of law, or be guilty of misfeasance or malfeasance in office, shall be impeached and removed from office in the same manner provided for the impeachment and removal of judges of the supreme court of appeals: and any officer of the commission for like causes, or for neglect of duty, or when, in the judgment of the commission, the public service will be promoted thereby, may be removed from office by the commission.

Board of Public Works and Railroad Commissioner to Surrender Records, Books, &c., to the Commission.

53. The board of public works and the railroad commissioner shall on the second day of March, nineteen hundred and three, or as soon thereafter as requested by the commission, surrender and deliver to the commission the records, books, files, and papers of their respective offices, and thereafter said records, books, files, and papers shall be and remain a part of the records, books, papers and files of the commission.

Salaries.

54. That the annual salaries of the members and officers of the commission shall be as follows: Each commissioner, four thousand dollars; the clerk, two thousand dollars; the first assistant clerk, fifteen hundred dollars; the stenographer, twelve hundred dollars;

and the bailiff, nine hundred dollars; and the auditor of public accounts shall draw his warrant upon the public treasury for the payment of said salaries in equal monthly payments for each month of their respective terms of office.

Not to Impair Jurisdiction of Courts; Concurrent Jurisdiction.

55. This act shall not be construed to take away or impair the jurisdiction of any court of this Commonwealth to hear and determine any proceeding, suit or motion of which it now has jurisdiction, for the enforcement of any fine or penalty against any corporation under the laws of this State, but that the powers and jurisdic-
164 tion of the commission to hear, determine, and enforce such fines and penalties shall be construed to be concurrent.

Powers and Duties Vested in Commission.

56. The commission is hereby charged with all the duties and vested with all the rights, property, functions, and powers heretofore performed, vested in, and exercised by the board of public works, except in so far as the same may be in conflict with the Constitution and laws of this State, and the commission shall particularly perform the duties and exercise the powers heretofore performed and exercised by said board, prescribed in sections fifty-nine to seventy-eight, inclusive, of this act.

The Commission or Some Member to Attend the Sale of Work of Internal Improvement in which the State is Interested.

57. The commission, or some member thereof, shall, and is hereby directed and authorized to, attend the sale of any work of internal improvement in which the State is a stockholder or otherwise interested, whether such sale be made by virtue of mortgage, judgment, decree, or other lien.

When State may proceed against company by *quo warranto* and sell the works for abandonment or failure to use; deed of conveyance to be executed; collection of debts and proceeds of sale; purchaser to become corporation with privileges, &c., of old company.

58. If the works of any internal improvement company be not commenced and be completed within the time prescribed by law, or by its charter, or if after such works be completed, the company abandon them, or for three successive years cease to use and fail to keep them in good repair, in each of these cases the State may proceed against such company by writ of *quo warranto*, or infor-
165 mation in the nature of a writ of *quo warranto*, and if in any such proceeding there is a judgment against the company, the commission shall forthwith take possession of its work and property and sell the same (except the debts owing to the company), and convey the works and property so sold to the purchaser thereof as soon as the purchase money has been paid, the deed of

conveyance to be executed by the chairman of the commission under its seal. The commission shall, moreover, collect, as far as practicable, the debts aforesaid, and apply the proceeds thereof, and of the said sale, after deducting the costs and expenses of the collection and sale, to the discharge of the liabilities of the company, and whatever remains after said liabilities are discharged, pay into the treasury of the State. Upon such conveyance to the said purchaser, he shall forthwith be a corporation by any name which may be set forth in such conveyance, or any writing signed by him and admitted to record in the county or corporation wherein the conveyance shall be admitted to record; and to the corporation thus created all the provisions of section twelve hundred and thirty-four of the Code shall apply, except that the franchises, rights, and privileges to which such corporation shall succeed and the duties which it shall perform, shall be such as would have been had or performed by the first company but for the judgment aforesaid in the proceeding by writ of *quo warranto*, or information in the nature of a writ of *quo warranto*, save only as in said section provided.

The Commission May Convey State's Interest in Road to County.

59. It shall be the duty of the commission, with the consent of the board of supervisors of any county given at any regular meeting by a two-thirds vote of all elected in such county, where in their opinion the public interest will be promoted thereby, to transfer and convey the State's interest in any turnpike or plank road, or any part thereof, to the county or counties in which said road lies. The transfer shall be made by a formal order to be entered upon the minutes of the proceedings of the commission, and a copy to
166 be transmitted by its clerk to the clerk of the circuit or county court for record in the clerk's office in each county where the said road lies.

The Commission to Collect Dividends, &c., from Work in which State is Interested.

60. The commission shall be vested with power to collect any fund or dividend due from any work of internal improvement in which the State is interested, and to pay the same into the treasury to the credit of the sinking fund.

Proxies for Stock Held by State.

61. The commission, for all works in which the State may hold stock heretofore subscribed and not disposed of, shall from time to time appoint one or more proxies to represent the stock held by or on behalf of the State in the company having control of such work: provided, that the present proxies shall hold over until their successors are appointed.

Duty of State Proxies.

62. In cases in which it may be desired by the commission, its proxies shall cause to be transmitted to it copies of the reports of the

proceedings of the directors of the companies in which they are proxies, the proceedings of the stockholders thereof, and other documents relating to the works, and shall make such reports as the commission may require or to the proxies may seem proper.

State Directors.

63. In every company to the stock of which the board of public works or the State has heretofore subscribed and which has not been disposed of, the commission shall appoint such portion of the directors as shall bear to the whole number of the directors of such company the same proportion, as nearly as possible, that the
167 stock held on behalf of the State in such company bears to the whole capital stock thereof.

When Appointed.

64. The appointment of directors in a company, according to the preceding section, shall be made by the commission before each annual meeting therein.

Terms of Directors and Proxies.

65. Proxies and directors appointed by the commission shall be in office from the time such appointment is in force until their successors are appointed, unless sooner removed. When a proxy fails to attend at any meeting, the commission, without removing him, may make a temporary appointment, to be in force during his absence.

The Commission to Keep Register of the Property of the State.

66. The commission and the second auditor shall cause to be registered, in books to be kept in their respective offices for the purpose, all claims, stocks, bonds, choses in action, and all property, real or personal, due or belonging to the State, with such description thereof as will enable easy reference to the same by any State officer or person interested.

Money Recovered by Action in Circuit Court of Richmond.

67. Any money forfeited to the commission, and any money which ought to be paid into the public treasury to the credit of the fund for internal improvement, shall be recovered, with interest on such money from the time the same ought to be paid by motion, after fifteen days' notice, or by action in the circuit court of the city of Richmond. The second auditor shall institute and prosecute in the name of the Commonwealth the proceedings after an order for such motion or action shall have been made by the commission.

168 Agents for the Collection of Debts, &c.

68. The commission may appoint agents for the collection of its debts or claims, and authorize them to secure payment thereof on such terms as it may approve, except it shall not appoint an agent

to collect any judgment, fine, or penalty rendered or imposed by the commission.

When Commission May Purchase Estate Taken Under Execution.

69. When the estate of any person taken under execution or for sale under any decree or deed of trust for any such debt or claim will not sell for the amount thereof, the commission may purchase such estate.

May Sell and Convey Any Estate so Purchased.

70. The commission may sell any estate so purchased, at such time and on such terms as the commission may deem advantageous, and the commission shall execute a deed conveying to the purchaser all the interest which the commission may have in such land.

Compensation of Agent Under This Act.

71. For the services of any agent under this act, the commission may allow compensation not exceeding in any case, five per centum on the money actually paid into the treasury.

The Commission to Fix Tolls, &c.

72. Where the tolls of any canal, navigation, or bridge company are not prescribed by its charter, the commission shall fix such tolls as may seem to it reasonable, and may alter the same at its pleasure.

169 Assent by Stockholders to Sec. 65 of This Act.

73. If in any company incorporated and organized before the first day of July, eighteen hundred and fifty, to the stock of which the board of public works or the State has, before or since that date, subscribed, a resolution be adopted in general meeting of the stockholders (by the vote of the majority of the stockholders, other than the State), assenting to section sixty-five of this act, the same shall thenceforth be of the same force in respect to such company that it would be if it had formed a part of the act incorporating such company. If such assent be not given, the votes in the meetings of the stockholders of such company and the appointment of directors therein shall continue to be according to the laws in force on the day before the Code of eighteen hundred and eighty-seven took effect, unless it be a company whose charter is, by the terms thereof, subject to be altered, amended, or modified by the general assembly; in which case the said section sixty-five shall be of the same force in respect to it as if such assent had been given.

Sale by James River and Kanawha Company of Its Works, &c., to Richmond and Alleghany Railroad Company.

74. That so much of the act entitled "an act to authorize the James River and Kanawha Company to make sale and transfer of all its works, property, and franchises to the Richmond and Alleghany Railroad Company, and to define the powers and duties of the board of public works in reference thereto," approved February twenty-seventh, eighteen hundred and seventy-nine, as has not been carried

into effect, shall continue in force, and the commission shall exercise all the powers and perform all the duties conferred and imposed upon the board of public works by the said act.

The Commission to Make Report Showing Condition of Work or Company in Which State Has an Interest.

75. The commission shall make report to the general assembly at each regular session, showing the condition of each work made on the State account, or to the stock of which the board
170 of public works or the State had heretofore subscribed, and giving such other information in relation thereto as it may deem pertinent. And the second auditor shall also report to the general assembly, at such regular session a succinct statement relative to every such work, showing the gross amount of the year's income therefrom, the net balance of such income remaining, after paying current expenses, and interest on debts due on account of the work, and what percentage, such net balance is on the capital expended. On or before the first day of October the said reports shall be delivered to the superintendent of public printing, and he shall cause the same to be printed.

76. That subsection twelve of section one hundred and eighty-three, and sections twelve hundred and twelve, twelve hundred and thirty-six, twelve hundred and thirty-nine, twelve hundred and fifty-four, twelve hundred and ninety-eight, twelve hundred and ninety-nine, thirteen hundred, as amended by an act of the general assembly, approved March fourth, nineteen hundred; thirteen hundred and one, thirteen hundred and two, thirteen hundred and three, thirteen hundred and six, thirteen hundred and seven, thirteen hundred and eight, thirteen hundred and ten, thirteen hundred and eleven, as amended by an act of the general assembly, approved March fourth, nineteen hundred; thirteen hundred and twelve, thirteen hundred and thirteen, thirteen hundred and fourteen, thirteen hundred and fifteen, thirteen hundred and sixteen, thirteen hundred and seventeen, thirteen hundred and eighteen, thirteen hundred and nineteen, thirteen hundred and twenty, thirteen hundred and twenty-one, thirteen hundred and twenty-two, thirteen hundred and twenty-three, thirteen hundred and twenty-four, thirteen hundred and twenty-five, thirteen hundred and twenty-six, thirteen hundred and twenty-seven, thirteen hundred and twenty-eight, thirteen hundred and twenty-nine, thirteen hundred and thirty, thirteen hundred and thirty-one, thirteen hundred and thirty-two, thirteen hundred and thirty-three, and thirteen hundred and thirty-seven of the Code of eighteen
171 hundred and eighty-seven, and sections eleven, twelve, and thirteen of the act of the general assembly of Virginia, approved March third, eighteen hundred and ninety-two, entitled an act to further regulate and control common carriers doing business in this State, and further defining the duties of the railroad commissioner in relation thereto, be, and the same are hereby, repealed.

77. This act shall be in force from its passage.

COMMONWEALTH OF VIRGINIA:

I, D. Q. Eggleston, Secretary of the Commonwealth of Virginia, and keeper of the seals thereof, do hereby certify that the foregoing (excepting the headings to the sections thereof) is a true copy of an act of the General Assembly of Virginia, entitled "An act to put into effective operation the provisions of the constitution relating to the creation, appointment and organization of the 'State Corporation Commission,' its jurisdiction, powers, functions and duties; the qualifications of the members and officers thereof, their appointment and salaries; the location of its offices and places and times of its public sessions; its writs, processes, orders, findings and judgments; appeals from its orders, findings and judgments, and its expenses, etc.," approved April 15, 1903, as the same is published according to law; that said act is still in full force and effect, and has been so continuously since prior to January 1st, 1904,—with this exception, that, by an act approved March 15, 1906, section 58 of the foregoing act was amended, and that said section is printed above as it reads after, instead of before, its amendment.

Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this 25th day of June, in the year of our Lord nineteen hundred and seven.

[Lesser Seal of the Commonwealth.]

D. Q. EGGLESTON,
Secretary of the Commonwealth and
Keeper of Seals.

172 DEFENDANTS' EXHIBIT NO. 3.

COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

CITY OF RICHMOND, *Tuesday, Oct. 6,* 1903.

The Commission having, as required by law, formulated a set of Rules of Practice and Procedure, in cases and proceedings before it, it is ordered that the same become operative on and after this date, and that they be spread in full upon the minutes of the Commission, and being so recorded in the Order Book, are in the words and figures following, viz:

Rules of Practice and Procedure Before the State Corporation Commission of Virginia.

Public Sessions.

1. The regular Public Sessions of the Commission, sitting as a court, for the hearing of contested cases and matters properly coming before it, will be held at its offices, in the City of Richmond, on the second Monday in January, April, June, September and November

in each year. These sessions may be adjourned from time to time, and shall last so long as the business before the Commission, and the public interests may require. These sessions may be adjourned, during their respective terms, to any other place in the State, upon order of the Commission, that the public necessity or the convenience of the parties require an adjournment.

Special judicial sessions of the Commission may be held at any time upon order of the Commission, or a majority of its
173 members, in the City of Richmond, or elsewhere in the State, for the hearing of all matters over which the Commission has jurisdiction.

Parties.

2. All complaints, proceedings, contests, or controversies, before the Commission, shall be instituted in the name of the Commonwealth, as complainant, and the party against whom the complaint is preferred, or the proceeding instituted, shall be the defendant; in all proceedings instituted by the Commission of its own motion, the complainant shall be, "The Commonwealth at the relation of the State Corporation Commission"; in all other complaints and proceedings, instituted by parties, the complainant shall be styled "The Commonwealth at the relation of ——."

Any person, firm, corporation, or association, or any commercial body, may institute a complaint before the Commission. When instituted by an unincorporated association or mercantile body, the complaint must be in the name of a committee of not less than two persons on behalf of such association or body.

When the complaint concerns anything done, or omitted to be done, by a single carrier or other corporation, no other need be made a party, but if it relates to joint tariffs, or questions in which two or more carriers or other corporations are interested all such must be made parties. A complaint may embrace several carriers, or lines of carriers, operated separately, in the same proceeding, when the subject matter of the complaint involves substantially the same violation of the law, or of the rules and regulations of the Commission, by the several carriers or lines. Persons or carriers not originally parties may apply, in any pending case or proceeding, for leave to intervene, and to be heard upon the questions involved. Such application must be by petition, verified by oath, which must set forth the petitioners' interest in the proceeding.

174 Petitions and Complaints.

3. All complaints for the redress of alleged grievances or violation of law by the defendant must be in writing and addressed to the Commission. Such petition or complaint must distinctly and plainly set forth the grounds of complaint, the items being numbered, and the petition or complaint must be verified by affidavit. The name of the corporation, or other parties complained against, must be stated in full, and the address of the complainant, with the name and address of his attorney or counsel, if any, must appear upon the petition, where the complaint is made otherwise than on the motion of the Commission.

Notice.

4. The petition or complaint may be filed before the Commission, or with its clerk, and, thereupon, a notice, in the form of a writ, shall be issued, according to law, by the Clerk, directed to the Bailiff of the Commission or other proper officer, summoning the defendant or defendants to appear before the Commission on the day named therein, which shall not be less than ten days from the filing of the complaint. The said writ and notice, and a copy of the complaint, shall be served upon the defendant or defendants, and return made according to law.

Answers.

5. Upon the day named in the writ, or notice, the defendant or defendants shall file before the Commission an answer in writing, specifically admitting or denying, by items, the material allegations of the complaint, and setting forth the facts which will be relied upon to support any such denial. The answer shall be verified by affidavit, and be signed by the attorney or counsel, if there be such. If the parties are ready, upon the filing of the answer, the Commission may proceed at once to hear the matter of contest. If either party be not prepared for the hearing, then an adjournment may be had
175 and the day for the hearing fixed upon the application of either party, in the discretion of the Commission.

Instead of answering the complaint, defendant or defendants may demur to the same, filing a demurrer in writing on the return day.

Amendments.

6. Upon the application of any party, amendments to any complaint or answer in any proceeding or investigation may be allowed by the Commission, in its discretion.

Stipulations or Agreed Facts.

7. The parties to any complaint or proceeding before the Commission may, by stipulation in writing, filed with the Commission, agree upon the facts, or any portion thereof, involved in the controversy, which stipulation shall be recorded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

Hearings.

8. Upon the filing of the answer, the hearing will proceed at once, or the Commission will assign the time and place for the same. Witnesses will be examined orally before the Commission, unless testimony or facts are agreed upon, as otherwise provided in these rules. The petitioner or complainant must prove the existence of the facts complained of, unless they are admitted, or the defendants be in default by failing to answer. Facts alleged in the answer must be proved by the defendant or defendants, unless admitted by complainant. In cases of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and

make such order thereon as the circumstances of the case may require.

176 Depositions and Witnesses.

9. The testimony of any witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Commission after the same is at issue by the filing of the answer. Such depositions must be after notice, and before the officer required and allowed by the statutes of Virginia. Any party, complainant or defendant shall be entitled to process to compel the attendance of witnesses or the production of books and papers before the Commission. Such process will be issued, for proper service and return by the clerk of the Commission, upon application of any party to the proceeding. When depositions are taken they must be returned to the Clerk of the Commission, as depositions are required by law to be returned to the Clerk of a court of chancery.

Argument.

10. Whenever requested by the proper authorities, the Attorney-General of the State may represent the complainant in any proceeding.

Arguments may be made orally before the Commission or written or printed briefs may be filed in any case within such time as may be prescribed by the Commission in such case. For convenience in reading and filing, it is requested that, whenever practicable, in cases of importance, arguments be printed.

Special Matters.

11. In the performance of special functions of a judicial nature, imposed upon it directly by law, and not instituted by any complaint such as the assessment of property of corporations and other like matters, such notices will be given and proceedings be had, as are required by the statutes under which the Commission acts in the performance of such duties.

177 General Business.

12. The offices of the Commission, on the fourth floor of the City Hall of Richmond, will be open for the transaction of business on week days from 9 A. M. to 6 P. M. When the Commission is not in session, applications for charters and all papers to be presented to the Commission, or filed in its offices, may be left with the Clerk. Official communications by mail should be addressed to the "State Corporation Commission," and not to the Chairman or any member of the Commission individually.

COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

CITY OF RICHMOND, *8th of January*, 1906.

The books, papers and records of the State Corporation Commission having been removed from the quarters heretofore occupied by it in the City Hall of the City of Richmond to the rooms assigned to it for the use of the members and the clerical force of the Commission, including a room assigned to it for use as a hearing or court-room, all in the restored Capitol Building of the State; and the Commission being now in occupancy and possession of the said rooms and said court-room in the Capitol Building;

It is ordered, That the same be and remain its permanent quarters and hearing or court-room until other provision is made by law.

VIRGINIA, *City of Richmond, To wit:*

We, R. R. Prentis and R. T. Wilson, chairman, and clerk, respectively, of the State Corporation Commission of Virginia, do hereby certify that the foregoing is a full, complete and true copy of the rules of practice and procedure before the said Commission;
178 that the said rules, &c., were prescribed and entered of record as above set forth; that, as is above shown, section 12 of said rules, &c., was, in one respect, amended by the foregoing order of January 8th, 1906; and that, with the exception of said section 12, all of the foregoing rules, &c., are now in full force and effect, and have been so continuously since the 6th day of October, 1903.

In testimony whereof, we have hereunto set our hands and affixed the seal of the said State Corporation Commission, this, the 25th day of June, 1907.

[Seal of the State Corporation Commission of Virginia.]

ROBERT R. PRENTIS, *Chairman.*
R. T. WILSON, *Clerk.*

This day, R. T. Wilson, clerk of the State Corporation Commission of Virginia, to me personally known, appeared in person before me, the undersigned, a notary public in and for the City of Richmond, in the State of Virginia, and, before me, in my said city, subscribed and made oath to the foregoing certificate.

In testimony whereof, I have hereunto set my hand and affixed my official seal this, the 25th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

179 DEFENDANTS' EXHIBIT NO. 4.

STATE OF VIRGINIA, *City of Richmond, To-wit:*

This day, R. T. Wilson, to me personally known, appeared in person before me, the undersigned, a notary public in and for the city aforesaid, in the State of Virginia, and made oath before me, in my said city as follows:

That he is now, and has been continuously since the 31st day of July, 1906, the clerk of the State Corporation Commission of Virginia.

That, between the 31st day of October, 1906, and the 27th day of April, 1907, the said Commission was engaged a great number of days, in receiving testimony, hearing argument, and otherwise considering, the matters and things involved in and connected with the proceeding before said Commission, which may be called the "Passenger Rate Proceeding," and in which the said Commission, on the 27th day of April, 1907, entered its order prescribing the maximum passenger rates to be charged by the several railroad companies mentioned in said order.

That all of the railroad companies mentioned in said order appeared before the said Commission during the course of said proceeding, filed answers in the same, on the 1st day of November, 1906, produced witnesses before said Commission, introduced much documentary evidence, and made elaborate defences therein.

That the oral testimony adduced before said Commission by all of the railroad companies appearing in said proceeding was taken down by stenographers, and thereafter reduced to writing, and such testimony, together with the documentary evidence also introduced in said proceeding, and the evidence in the "Freight Rate Proceeding," next hereinafter referred to, covers several thousand pages.

That, prior to the said 27th day of April, 1907, the said Commission had devoted several months to the hearing of evidence
180 and argument in a proceeding before it, the object of which was to enter an order relating to *freight* charges to be made by the railroad companies which were parties to that proceeding, which may be called the "Freight Rate Proceeding"; that the *Southern Railway Company, Chesapeake & Ohio Railway Co., Norfolk & Western Railway Co., Atlantic Coast Line Railroad Co.*, and *Louisville & Nashville Railroad Co.*, were all parties to said "Freight Rate Proceeding," and not only filed answers, but introduced much testimony therein; that the oral testimony adduced before said Commission by all of the railroad companies appearing in said "Freight Rate Proceeding" was taken down by stenographers, and thereafter reduced to writing, and such testimony, together with the documentary evidence also introduced in said proceeding, covers several thousand pages; that the said evidence in said "Freight Rate Proceeding" was made a part of the evidence in said "Passenger Rate Proceeding," and that all of the evidence referred to in this affidavit is now in the possession and custody of the said affiant, in his capacity as clerk of the said Commission, and is preserved by him

to be made a part of the record of said "Passenger Rate Proceeding" when so ordered by said Commission, in case of appeal in said proceeding.

That the signature next hereunto affixed is the signature of the said affiant.

R. T. WILSON.

In testimony whereof, I, the aforesaid notary public, have hereunto subscribed my signature, and affixed my notarial seal, this the 25th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

181 DEFENDANTS' EXHIBIT No. 5.

VIRGINIA:

Pleas before the State Corporation Commission, at its Court-room in the City of Richmond, Virginia, on the 27th Day of April, 1907.

Judicial Case 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

Be it remembered, that heretofore, to-wit: on Tuesday, the 31st day of July, 1906, the following notice and order was entered:

Offices of the State Corporation Commission.

RICHMOND, VA., *31st Day of July,* 1906.

To the Several Steam Railroad Companies doing business in Virginia, and all persons interested:

Take notice, that the State Corporation Commission will, in the City of Richmond, on Thursday the first day of November, 1906, at 12:00 o'clock noon, in accordance with authority conferred by the Constitution of Virginia, and the statutes enacted by the General Assembly of Virginia pursuant thereto, hear and consider any objections which may be urged against a rule, regulation, order, or requirement of the Commission, fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one railroad company, or joint transportation over the lines of two or more companies; and whether the contract for transportation of a passenger or passengers be evidenced by an ordinary
182 ticket between stations, by a mileage book, or otherwise; the Commission to have, as authorized by law, the power and au-

thority from time to time, and as often as circumstances may require, to change or revise the rate, or by rules, regulations and requirements to provide for the more convenient and expedient putting into effect and proper observance of said maximum rate. At the said hearing and consideration of the said maximum rate of two cents per mile, the method, time and extent of promulgating and putting into effect the same, will be heard and determined by the Commission, to the end that a maximum rate for passenger transportation may be put into effect and be made applicable to all steam railroad companies doing business in Virginia, and be properly observed by them in the transportation of passengers.

BEVERLEY T. CRUMP, *Chairman:*
H. C. STUART,
JOS. E. WILLARD,
Commissioners.

And at another day, towit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Thursday, November 1st, 1906, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

NOVEMBER 1ST, 1906.

In the Matter of Prescribing a Maximum Passenger Rate.

The notice in this proceeding, addressed to the several steam railroad companies doing business in Virginia and all persons interested, having been regularly published as prescribed by law once a week for four successive weeks in the Times-Dispatch, a daily news-
183 paper published in the City of Richmond, this matter came before the Commission for hearing on this day. Several of the railroad companies doing business in Virginia appeared before the Commission, by counsel, and answers were filed on behalf of the Atlantic Coast Line Railroad Company, the Norfolk & Western Railway Company, The Chesapeake and Ohio Railway Company, Seaboard Air Line Railway, Virginia and Southwestern Railway Company, Chesapeake Western Railway Company, the Valley Railroad Company and the Baltimore and Ohio Railroad Company operating the Winchester and Strasburg and the Winchester and Potomac Railroad, the Southern Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Washington-Southern Railway Company, and the Virginia and Kentucky Railway Company, and leave was granted to any of the other railroads to file answers herein before the taking of testimony was commenced. Thereupon, the hearing and investigation of the matters involved in this proceeding were continued to Tuesday, th- 4th day of December, 1906, at 11:00 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission, continued by adjournment at the court-room aforesaid on Tuesday, December 4th, 1906, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *December 4th*, 1906.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in this proceeding on the first day of November, the matter herein involved came on this day to be heard. Thereupon, the hearing and investigation was con-
184 tinued to Tuesday, the 11th day of December, 1906, at 11:00 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission, continued by adjournment at the court-room aforesaid on Monday, December 10th, 1906, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *December 10th*, 1906.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in this proceeding on the 4th day of December, 1906, the matters herein involved came on this day to be heard. Thereupon, the hearing and investigation was continued to Wednesday the 19th day of December, 1906, at 11 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission, continued by adjournment at the court-room aforesaid on Wednesday, December 19th, 1906, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *16th Day of Jan'y*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

185 Pursuant to the order entered in this proceeding on the 11th day of December, 1906, the matters herein involved, came on this day to be heard. Thereupon the hearing and investigation was continued to Wednesday the 16th day of January, 1907, at 11 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Wednesday, January 16th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *16th Day of Jan'y*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in this proceeding on the 19th day of December, 1906, the matters herein involved came on this day to be heard. Thereupon by leave of the Commission, the Norfolk and Southern Railway Company, the Louisville and Nashville R. R. Co. and the New York, Philadelphia and Norfolk R. R. Co. filed their respective answers in writing before the Commission. Thereupon the hearing and investigation in this proceeding was continued to Tuesday the 22nd day of Jan'y, 1907, at 11 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Tuesday, January 22nd, 1907, the following order was entered:

186 **No. 99.**

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *22nd Day of Jan'y*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to order entered in these proceedings on the 16th day of January, 1907, the parties again appeared before the Commission on this day and the taking of testimony herein was commenced, testimony being first adduced by the Chesapeake and Ohio Ry. Co.; and not being concluded on this day was adjourned over for further hearing until to-morrow and ordered to be continued from day to day or from time to time until concluded.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Monday, January 28th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *28th Day of Jan'y*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in these proceedings on the 22nd day of January, 1907, these proceedings were heard and
187 testimony was taken before the Commission bearing upon the matters at issue herein, by the Chesapeake and Ohio Railway Company and the Norfolk and Western Ry. Co. at public sessions of the Commission held for that purpose on the 23rd, 24th, 25th, of January, 1907, and this day, and testimony not having been concluded at the adjournment of this day, the further taking of testimony and the hearing of all matters involved in this proceeding was continued until Wednesday, January 30th, 1907, at 11:00 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Wednesday, Jaanuary 30th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *January* 30, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in these proceedings on January 28th, 1907, the hearing of the matters at issue herein was resumed on this day. The Seaboard Air Line Railway Company appeared to-day before the Commission and presented testimony on its behalf bearing upon the matter involved in this proceeding. The testimony of said railroad company having been fully heard, the further hearing of this matter and the taking of testimony herein was continued until Tuesday, the 5th day of February, 1907, at 11 o'clock in the morning.

188 And at another day to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Tuesday, February 5th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *February* 5, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in these proceedings on the 30th day of January, these proceedings came on to be heard again this day and the further hearing and taking of testimony was continued until to-morrow the 6th day of February at 11:00 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Wednesday, February 6th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *February* 6, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered on yesterday these proceed-
189 ings were further heard on this day and testimony was taken
, before the Commission bearing upon the matters at issue herein, testimony being adduced by the Southern Railway Company, and not having been concluded at the adjournment on this day, the taking of the same and the hearing of all matters involved herein was continued to-day until to-morrow at 11 o'clock in the morning and further ordered to be continued from day to day or from time to time until the further order of the Commission.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room on Tuesday, February 12th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *February 12th,* 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered in these proceedings on the 6th day of February, 1907, the further hearing and taking of testimony herein not being concluded on that day was continued at a public session of the Commission held for that purpose on the 8th day of February, the 11th day of February and this day, testimony being heard on behalf of the Southern Railway Company, the Washington-Southern Railway Company and the Virginia and Southwestern Railway Company. The taking of testimony and the hear-
190 ing of the matters involved in these proceedings not being concluded on this day, these proceedings are continued until Tuesday, Feb'y 26th, 1907, at 11 o'clock in the morning.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Friday, March 1st, 1907, the following order was entered:

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *1st Day of March*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Pursuant to the order entered herein on the 12th day of February, 1907, the hearing and taking of testimony in this proceeding was resumed on the 26th day of February, 1907, and not being completed on that day was further continued and testimony taken on the 27th day of February and on the 1st day of March and the testimony on behalf of the railway companies which desired to be heard in this proceeding having been completed, the hearing and further taking of testimony herein on the part of the Commonwealth or of any defendant railway companies which may further desire to be heard was continued to a day to be fixed by the Commission of which the parties of record were to be notified.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Wednesday, March 27th, 1907, the following order was entered:

191 **No. 99.**

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *March 27th*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

Counsel of record having been notified that the hearing and consideration of these proceedings would be resumed on this date the parties appeared again before the Commission and further testimony was taken herein. The hearing not being completed on this day, was adjourned and continued until to-morrow morning at 11 o'clock.

And at another day, to-wit: At a session of the State Corporation Commission continued by adjournment at the court-room aforesaid on Thursday, March 28th, 1907, the following order was entered:

No. 99.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *March 28th*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

In these proceedings the parties, by counsel, again appeared before the Commission on this day and the further consideration of the matters involved herein was resumed. The testimony was fully completed on behalf of all railroad companies making objections
192 herein and also on behalf of the Commonwealth and all matters at issue on this hearing and in this proceeding were submitted to the Commission for its consideration and decision and for the entry of such rule, regulation, order or requirement as may be deemed just, reasonable and valid herein. The Commission not yet being advised of such proper order, rule, regulation or requirement time is taken to consider thereof.

No. 99.

And at this day, to-wit: At a session of the State Corporation Commission, continued by adjournment at the court-room aforesaid, the following judgment and order was entered:

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
v.
STEAM RAILROAD COMPANIES.

CITY OF RICHMOND, *27th Day of April*, 1907.

In the Matter of Prescribing a Maximum Passenger Rate.

The State Corporation Commission having carefully considered all the proceedings herein, and all the testimony, exhibits and statements adduced and filed before it in this proceeding, and having put its conclusions in writing, which are made a part of the record herein, the Commission, in order to carry out its said conclusions, now makes the following order and regulations and prescribes the following maximum rates to be observed by all the steam railroad companies operating in the State of Virginia, in the transportation of passengers:

1. It is ordered, that on and after the first day of July, 1907, the following steam railroad companies, viz:

Norfolk and Western Railway Company,
193 Chesapeake and Ohio Railway Company,
Atlantic Coast Line Railway Company,
Seaboard Air Line Railway Company,
Southern Railway Company,
Richmond, Fredericksburg and Potomac Railroad Company,
Washington-Southern Railway Company,
New York, Philadelphia and Norfolk Railroad Company,
Virginia and Southwestern Railway Company,
Louisville and Nashville Railroad Company

shall put into effect and observe a maximum rate of two cents per mile in the intra-state transportation of passengers in Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one of the said railroad companies, or joint transportation over the lines of two or more companies; and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than two cents per mile for the transportation of passengers over the lines controlled and operated by them, respectively, except as otherwise allowed in this order, or from time to time, by the State Corporation Commission.

2. It is ordered, that a maximum rate of two and one-half cents per mile for the intra-state transportation of passengers be fixed and prescribed to go into effect on and after the first day of July, 1907, on the following divisions or branches, of the Southern Railway Company, which are now excepted from the operation of the maximum rate of two cents per mile hereinabove fixed.

Norfolk Division, extending form Pinner's Point to Danville, 204 miles, exclusive of so much of the said division as may be in the State of North Carolina;

Franklin Branch, extending from Franklin Junction to Rocky Mount, 37 miles;

Claremont Branch, extending from James River Junction to Claremont, 50 miles.

194 From and after the said date it shal- be unlawful for the Southern Railway Company to charge or collect a greater sum than two and one-half cents per mile for the intra-state transportation of passengers over these divisions, or branches, unless otherwise directed, or allowed by the Commission.

3. It is ordered, that on and after the first day of July, 1907, the following steam railroad companies, viz.:

Chesapeake-Western Railway,
Cumberland Valley and Martinsburg Railroad Company,
Danville and Western Railway Company,
Indian Creek and Pound River Railroad Company,
Marion and Rye Valley Railway Company,
Nelson and Albemarle Railway Company,
Valley Railroad Company of Virginia,
Virginia-Carolina Railway Company,
Virginia Southern Railroad Company,
Winchester and Potomac Railroad Company,

Winchester and Strasburg Railroad Company,
Norfolk and Southern Railway Company,

shall put into effect and observe a maximum rate of three cents per mile in the intra-state transportation of passengers in Virginia, and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than three cents per mile for the transportation of passengers over the lines controlled and operated by them, respectively, except as otherwise allowed from time to time by the State Corporation Commission.

4. It is ordered, that on and after the first day of July, 1907, the following steam railroad companies, viz.:

Big Sandy and Cumberland Railroad Company,
Black Mountain Railroad Company,
Interstate Railroad Company,
Lick Creek and Lake Erie Railroad Company,
Mt. Airy and Eastern Railway Company,
New River, Holston and Western Railroad Company,
Potomac, Fredericksburg and Piedmont Railroad Company,
195 Surry, Sussex and Southampton Railway Company,
Tidewater and Western Railroad Company,
Virginia Anthracite Coal and Railway Company,
Virginia and Kentucky Railway Company,
Wise Terminal Company,

shall put into effect and observe a maximum rate of three and one-half cents per mile in the intra-state transportation of passengers in Virginia, and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than three and one-half cents per mile for the transportation of passengers over the lines controlled and operated by them, respectively, except as otherwise allowed from time to time by the State Corporation Commission.

5. It is further ordered, that in applying the foregoing maximum passenger rates prescribed for the several railroads in Virginia, the railroad companies may charge and collect a minimum rate of ten cents per passenger for any single haul.

6. The payment of fares subject to the maximum rate herein prescribed shall entitle the passenger to the same transportation of baggage as now allowed by the carriers under, and in connection with the present rates and no steam railroad company operating in Virginia shall change or alter the rules governing the rights of passengers with respect to the transportation of baggage in Virginia, without the consent of the Commission first obtained.

7. Steam railroad companies operating in Virginia may charge and collect in addition to regular ticket rates the fixed sum of ten cents from all cash fare passengers who had been afforded reasonable opportunity for purchasing ticket before boarding train; provided that the conductor shall in all such cases deliver to passengers a receipt for the amount collected, redeemable at any ticket office of the company within thirty days from date of issue.

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It is ordered, that the clerk of the Commission do forth-
196 with publish this order in full in one of the newspapers of general circulation published in the City of Richmond, once a week -or four consecutive weeks, as required by law.

STATE OF VIRGINIA,
City of Richmond, To-wit:

I, Richard T. Wilson, clerk of the State Corporation Commission, do hereby certify that the foregoing is a true transcript from the judicial order book of the State Corporation Commission, of all orders entered in that certain proceeding lately depending before the said Commission under the name and style of:

Commonwealth of Virginia, at the relation of the State Corporation Commission,
v.
Steam Railroad Companies.

and designated in this office as judicial record 99.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the State Corporation Commission this 25th day of June, 1907. R. T. WILSON, *Clerk.*

[Seal of the State Corporation Commission of Virginia.]

197 This day, R. T. Wilson, clerk of the State Corporation Commission of Virginia, to me personally known, appeared in person before me, the undersigned, a notary public in and for the City of Richmond, in the State of Virginia, and, before me, in my said city, subscribed and made oath to the foregoing certificate.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this, the 25th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

198 *Opinion Referred to in Foregoing Order.*

Passenger Rate Case.

COMMONWEALTH OF VIRGINIA at the Relation of THE STATE CORPORATION COMMISSION
vs.
STEAM RAILROAD COMPANIES.

In the Matter of Fixing a Maximum Passenger Rate.

Conclusions of the Commission.

Relative to the proceedings to be observed by the State Corporation Commission before it passes upon the reasonableness of any rate

which it proposes to put into effect, it is provided in section 156*b* of the Constitution of Virginia, as follows:

tion Commission before it passes upon the reasonableness of any rate which it proposes to put into effect, it is provided in section 156b of the Constitution of Virginia, as follows:

"Before the commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company, or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have
199 process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also as long as it remains in force, be published in each subsequent annual report of the commission."

Proceeding in conformity with the foregoing provision of the organic law of the State, the commission, on the 31st day of July, 1906, issued the following notice:

Notice.

Offices of the State Corporation Commission.

RICHMOND, VA., 31*st Day of July,* 1906.

To the several steam railroad companies doing business in Virginia, and all persons interested:

Take notice that the State Corporation Commission will, in the city of Richmond, on Thursday, the first day of November, 1906, at 12 o'clock noon, in accordance with authority conferred by the Constitution of Virginia and the statutes enacted by the General Assembly of Virginia pursuant thereto, hear and consider any objections which may be urged against a rule, regulation, order
200 or requirement of the commission fixing and prescribing a maximum rate or charge of two cents per mile for the trans-

portation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one railroad company, or joint transportation over the lines of two or more companies; and whether the contract for transportation of a passenger, or passengers be evidenced by an ordinary ticket between stations, by a mileage book, or otherwise; the commission to have, as authorized by law, the power and authority, from time to time, and as often as circumstances may require, to change or revise the rate, or by rules, regulations and requirements to provide for the more convenient and expedient putting into effect and proper observance of said maximum rate. At the said hearing and consideration of the said maximum rate of two cents per mile, the method, time and extent of promulgating and putting into effect of the same will be heard and determined by the commission, to the end that a maximum rate for passenger transportation may be put into effect and be made applicable to all steam railroad companies doing business in Virginia, and be properly observed by them in the transportation of passengers.

BEVERLEY T. CRUMP, *Chairman*,
H. C. STUART,
JOSEPH E. WILLARD,
Commissioners.

This notice was published once a week for four consecutive weeks in *The Times-Dispatch*, a newspaper of general circulation published in the city of Richmond.

In accordance with the foregoing notice, the leading railroad companies doing business in the State of Virginia appeared be-
201 fore the commission on the first day of November, 1906, and filed written, or printed, answers, in which were set out in detail the objections which they desired to urge against the proposed maximum passenger rate of two cents per mile. Following upon the filing of these answers, testimony was introduced before the commission from time to time, and all the issues arising in these proceedings were finally submitted to the commission for its determination on the 29th day of March, 1907.

The commission has given careful consideration to the objections made by the railroad companies involving solely questions of law, and to the most voluminous and detailed testimony adduced before it.

We have first to deal with two preliminary questions of law which are urged by the defendant railroad companies in their answers, and which must be first disposed of, as they challenge the right of the commission to take any action in this proceeding.

It is contended, in the first place, that the provisions of article XII of the Constitution of Virginia, providing for the creation, functions, duties and powers of the State Corporation Commission, are in violation of the fourteenth amendment to the Constitution of the United States, in that those provisions of the Constitution of Virginia, in their execution, deprive the defendant railroad companies

of their properties without due process of law, and deny to them the equal protection of the laws. It is contended, in the next place, that as to all the defendant railroad companies whose charters were granted by the State of Virginia prior to the adoption of the new Constitution in July, 1902, there existed a contract between the State and the said railroad companies whereby it was agreed that the State would not undertake to prescribe the tolls or charges upon the said railroad companies, and that the provisions of the Constitution and laws of the State of Virginia conferring upon the State Corporation Commission power to prescribe rates impaired the obligation of that contract, and that hence the commission has no power to fix or prescribe a maximum passenger rate in this proceeding.

202 The first objection above mentioned is based upon the fact that the Constitution of the State, in creating the State Corporation Commission, has conferred upon it judicial, executive and legislative powers; that the commission has authority to consider, prescribe and put into effect rates to be charged by the railroads, and has likewise power, as a judicial tribunal, to pass upon the reasonableness of the rates so proposed by it. The position is taken that a tribunal thus created is unlike the regular courts to which other persons in the State may submit their controversies, and that, in being required to come before such a tribunal, they are denied due process of law, and likewise equal protection of the laws.

It is unnecessary for the commission to consider this objection at length, as it has been recently passed upon by the Supreme Court of Appeals of Virginia. In the case of *Winchester and Strasburg R. R. Co. vs. Town of Strasburg*, decided by the Supreme Court of Appeals of Virginia on December 6, 1906, on appeal from the commission, this question was discussed at length by the court, and the provisions of the Constitution were upheld as valid, and not in violation of the fourteenth amendment to the Constitution of the United States, although the commission had clearly conferred upon it, to a certain extent, judicial functions as well as legislative and administrative authority.

The second objection urged by the defendant railroad companies as a matter of law is based upon certain provisions of the statutory law of Virginia, which have been in effect for many years, and which are now contained in sections 1202, 1240 and 1242 of the Code of Virginia of 1887. These sections of the Code are portions of the general railroad law of the State. It is provided in section 1240 that the charter of every company, which is governed by an act passed in March, 1837, prescribing certain general regulations for the incorporation of railroad companies, and the charter of every company theretofore or thereafter incorporated, which shall be governed by that chapter, "may be altered, modified, or repealed by any future legislature as may seem to it proper, except that no law

203 shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent, in any other cases than such as are specially provided for in this chapter." In section 1242 it is provided that laws may be passed reducing the tolls of a railroad company when its net profits shall be such that dividends might be de-

clared out of such net profits exceeding the rate of fifteen per centum per annum on the capital stock invested; but that no law shall reduce the tolls so as to prevent dividends at fifteen per centum per annum within thirty years from the time when the first dividends of profits were declared, or so as to prevent dividends of twelve per centum per annum after the said thirty years, and before fifty years from the same time, or so as to prevent dividends of ten per centum per annum after the said fifty years.

It is alleged in the several answers that the railroad companies have not at any time earned such net profits as would enable them to declare the respective dividends mentioned in this statute. It is insisted that therefore, the State has contracted with the railroad companies that no laws should be passed changing their tolls or charges without their assent until such dividends as are contemplated by the statute have been earned. The question before the commission, therefore, is whether such a contract exists, and whether the present provisions of the Constitution of Virginia and the statutes enacted in pursuance thereof constitute an impairment of the obligation of that contract.

We do not deem it necessary to discuss this question at length, but content ourselves with referring to a recent case decided by the Circuit Court of the United States for the Western District of Texas. See *Houston and T. C. R. R. Co. vs. Storey*, 149 Fed. Rep. 499. In that case a bill was filed by the railroad companies to enjoin the enforcement of rates established by the Railroad Commission of Texas. The railroad companies alleged that there existed a contract between them and the State of Texas which precluded the State and
204 the railroad commission from prescribing the rates in question. The section of the Texas statutes relied upon was as follows:

"It shall be lawful for the legislature at any time to prescribe the rates to be charged for the transportation of persons and property upon any such road, should they be deemed too high, and may exercise the same power every ten years: provided, that no reduction shall be made unless the net profit of the company for the previous ten years, the expenditures of the company being *bona fide* and not with a view to defeat the operation of this section, shall amount to a sum equal to twelve per centum per annum upon its capital stock, and then so as not to reduce the future probable profits below said per centum."

The question of the existence of this contract arose upon a demurrer to the bill, and is not discussed at length by the court. The court refers to *L. & N. R. R. Co. vs. Kentucky*, 183 U. S. 503; *San Antonio Traction Company vs. Altgeld*, 200 U. S. 304, and *Chicago, &c., R. R. Co. vs. Minnesota*, 134 U. S. 455, and holds, upon the authority of these cases, that there was nothing in the charter of any of the companies which expressly or by implication exempted them from liability to future legislation as to the prescribing of rates, and hence no contract between the State and the railroads, respectively, arose; that all the companies, whether chartered by special act of the legislature or under the general laws of the State, took their

charters subject to the general law, and to such changes as might be made in the general law, and subject to future constitutional provisions and future general legislation.

In *Louisville and Nashville R. R. Co. vs. Kentucky*, one of the cases relied upon by the Circuit Court, the Supreme Court of the United States says:

"In the absence, then, of any express prior contract between the State and the company exempting the latter from future con-
205 stitutional enactments, and without conceding that even such a contract would avail to relieve the company from constitutional changes in the exercise of the general police power of the State, it is sufficient to say that we do not find in section 218 of the Constitution of Kentucky any impairment of an existing contract between the State and the plaintiff in error."

It will be seen, therefore, that the Supreme Court of the United States does not concede the validity of a contract of this character between the State and a railroad company. This is based upon the general principle that one legislature cannot make such a contract as will prevent subsequent legislatures, or a constitutional convention from the exercise of the police power. This is a question of great importance and interest which it is unnecessary for us to allude to further than to say that, in the present state of the law, this commission must necessarily uphold the right of the State of Virginia to exercise unfettered the police power inherently residing in the State government. An examination of the charters of the several railroad companies which have appeared in this proceeding leads the commission to the conclusion that there is no language in any of them by which a contract, either expressly or impliedly, could be held to have been made with the State whereby the State had relinquished its governmental power to fix and prescribe reasonable rates to be charged by the railroads, with the possible exception of the charter of the Richmond, Fredericksburg and Potomac Railroad Company. The charter of this company is a very old charter, and it has been held by our State court that, under this charter, the property of the railroad company is exempt from taxation. The power of taxation, however, and the right of the government to prescribe rates rest upon different principles.

The commission overrules the objection that the rate-making power as exercised by the commission in this proceeding constitutes an impairment of the obligation of a contract between the State and the railroad companies as to the Richmond, Fredericksburg and Potomac Railroad Company.

206 It is also to be observed that the charters of some of the defendant railroad companies fall within the scope of the decision of the Supreme Court of the United States in *Norfolk and Western Railroad Company vs. Pendleton*, 156 U. S. 667.

The further objection is made that the adoption and promulgation of the proposed maximum passenger rate would, because many interstate passenger rates are made, and necessarily made, on combinations of locals, or by use of the local rate as a factor, necessarily disturb and regulate the interstate commerce of railroads to such

an extent as to come within the purview of the clause of the Federal Constitution relative to interstate commerce. The commission is of the opinion that this objection is clearly untenable.

The defendant railroad companies maintain that a maximum passenger rate of two cents per mile in Virginia would be unreasonable, or confiscatory. It has been strongly contended before the commission, as to each of the railroads involved, that a lowering of the maximum passenger rate in effect upon each of those roads would so affect their earnings as to make the lower maximum passenger rate unreasonable and unjust.

At the same time that the commission has been considering the question of a maximum passenger rate, it has also had before it proceedings having for their object the promulgation and putting into effect of an uniform Virginia freight classification, and freight tariffs thereunder. These two proceedings are designated, respectively, as the passenger rate case and the freight rate case. The freight rate case was taken up first, and by agreement any of the testimony adduced before the commission in that proceeding may be regarded also as testimony in the passenger rate case. So that in passing upon this matter of a maximum passenger rate, the commission will consider the records in both cases and all testimony, exhibits, facts and statements contained in both records, so far as pertinent.

The testimony taken before the commission as to the organization, the financial conditions, the earnings, and the present and future economic conditions of each of the roads appearing before the commission, has been most voluminous, and the commission
207 cannot undertake to analyze and tabulate the testimony in detail. The commission desires, however, before referring to the evidence, to examine briefly the underlying principles, so far as they have been settled, by which the reasonableness or confiscatory character of a rate is to be judged.

By the Constitution and laws of Virginia, the State Corporation Commission is vested with the legislative authority to make a rate. It is settled by statute and by adjudication that the commission has the right, and is constrained by the provisions of our Constitution, to pass upon the judicial question of whether or not the rate proposed by it is reasonable. Under the terms of the Constitution of Virginia, full provision is made for notice to the railroad companies, and every opportunity is given to test before the commission the question of the reasonableness of the proposed rate. There can be no question but that due process of law is afforded to the railroad companies under the procedure by which the State Corporation Commission is bound, and, therefore, the objection sustained in *Chicago, Milwaukee and St. Paul Railroad Company vs. Minnesota,* 134 U. S., 418, does not apply to the method of this commission in prescribing and putting into effect a rate. This commission is required, sitting as a court, to pass upon the judicial question of whether or not the rate proposed by it is reasonable, and from its judgment on that question an appeal is given from it, as a judicial tribunal, to the Supreme Court of Appeals of the State. We are required, therefore, to determine whether or not a maximum passenger rate of two cents per mile in Virginia, in the intra-state business of the railroads doing

business in the State, is reasonable, and if not, what maximum passenger rate is reasonable as to all of the roads, or as to the roads placed in several different classes. We must endeavor to determine briefly what are the principles by which the reasonableness of a rate is to be judged, and what the term reasonableness, applied to rates, means as a judicial question.

As we shall see, it is somewhat of a misconception to speak of the rate itself as being reasonable, because the reasonableness of
208 the rate depends in the end upon whether or not the rate is so unreasonably low as to constitute a violation of the rights secured to the railroad by the fourteenth amendment to the Constitution of the United States.

Reduced to its proper analysis, the defense of the railroad companies rests upon their allegation that the maximum rate proposed in this proceeding would so reduce their earnings as to deprive them of a reasonable income from their property without just compensation, and that to so deprive them of a reasonable income without compensation is to deprive them of due process of law within the extended meaning of that term as used in the fourteenth amendment; and that they are denied the equal protection of the laws because they are deprived of a reasonable income from their property without compensation, while other persons receive compensation for property appropriated by the State. The argument is that, to deprive the railroad of a reasonable income from its property, is the same as taking property itself, and this would seem to be true. An unreasonable rate is such a rate as is calculated to reduce the railroad earnings below the point of reasonableness. The term reasonableness, therefore, in the end, applies rather to the earnings of the railroad than to the rate itself. Understood as above stated, it is very common and natural to speak of the rate itself as being reasonable or unreasonable, and is a short method of stating the question as to whether or not the rate will unreasonably reduce the earnings of the railroad company.

What are the general considerations by which the commission should be guided in determining, from the facts before it, whether or not a maximum passenger rate of two cents per mile will unreasonably reduce the earnings of the railroads and so take their property without just compensation, and deny them the equal protection of the laws?

It is impossible to answer this question briefly, and it is equally impossible to answer it clearly and completely. Being a question arising under the Constitution of the United States, the decisions of the Supreme Court of the United States should be looked to
209 as controlling. Quite a large number of cases have now been decided by that supreme tribunal of the country bearing upon the reasonableness or confiscatory nature of rates prescribed by State legislatures, or by State commissions. A rate which is unreasonable is often termed to be confiscatory, because, if it takes the property of the railroad without compensation, it is in the nature of confiscation. While the doctrines which should control and guide a judicial tribunal in passing upon the question as to whether a proposed rate will reduce the earnings of a railroad unreasonably cannot

be said to have been clearly enunciated and well settled, yet the Supreme Court of the United States has, in several cases, been called upon to deal directly with these doctrines. Without referring to all of the cases which have been before that tribunal, we think it may be said that the following are the leading cases in the sense that they mark the several *stadia* in the development of these doctrines:

Chicago, Milwaukee and St. Paul Railroad vs. Minnesota, 134 U. S. 418; *Reagan vs. Farmers' Loan and Trust Company,* 154 U. S. 362; *Covington and Lexington Turnpike Road Company vs. Sanford,* 164 U. S. 578; *Smyth vs. Ames,* 169 U. S. 466; *San Diego Land and Town Company vs. National City,* 174 U. S. 739; *Minneapolis and St. Louis Railway Company vs. Minnesota,* 186 U. S. 257.

These cases refer to the intermediate decisions in such a way as to give a very fair presentation of the progress of the court-made law, and of the present condition of the doctrines enunciated by the court on these subjects.

From the cases we deduce the following general principles:

1. The rate enacted by the legislature, or otherwise proposed by the State, stands, as other legislation or action of a State, as valid and constitutional, and hence the burden is upon the railroad company of showing that the rate so enacted or proposed will reduce its earnings to a point which amounts to the confiscation of its property, or to the taking of its property without compensation. *Atlantic Coast Line Railroad vs. Florida,* 203 U. S. 256.

210 2. The railroad company may show that the proposed rate, when applied to its business, will not yield it a reasonable return on the fair value of the property used in the services for which the rate is paid. The return or profit which the railroad company is entitled to must not, therefore, be reckoned upon the capitalization of the company, but upon the reasonable value, or fair value, of the property used by the railroad for the public convenience. In other words, in considering this question, the real value of the property must be looked to, and not a fictitious value based upon the issuance of securities.

3. The Supreme Court of the United States has repeatedly declared that the railroad's right to earnings must also be limited by considerations relative to the rights of the public. This has been declared in nearly all of the cases above named, and in others. It is held that rates must be just, both to the public and the railroad. Thus, in the Reagan cases, it was stated:

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable."

Again, Justice Harlan, speaking for the court in the Smyth case, said, with reference to the contention that rates ought to permit the payment of dividends as well as of expenses:

"In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation, is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether

any consideration of the right of the public to be exempted from unreasonable exactions, and makes the interests of a corporation maintaining a public highway the sole test in determining
211 whether the rates established by or for it are such as may be rightfully prescribed as between it and the public."

The court in other cases has made numerous utterances to the same effect.

4. Other circumstances and conditions recognized by the court as important in determining the reasonableness of a rate, or of a railroad's income are economic in their nature, as they pertain to the industrial condition of the country through which the road is built, and other such considerations. In the Minnesota case, reported in 186 U. S. 268, it is suggested that a case may occur in which the condition of the country is such that rates high enough to pay operating expenses would be exorbitant, and would not be justified. While this statement was made in the course of the opinion in a general way, and rather as *obiter dictum*, it shows what a wide scope of consideration the court has in determining questions of this character. In the Reagan cases it was held that, if the road was unwisely built in localities where there is not sufficient business to sustain the road, the public are entitled to reasonable rates, and should not be made to suffer for the bad judgment of the railroad builders, although those rates may not yield earnings sufficient to remunerate the investors. In the Covington case it was held that, although the competition of new lines may reduce the business of the older lines, still the older line would not be justified in making rates unjust to shippers and the public, but must be content with smaller earnings. In the Smyth case the court was called upon to determine the reasonableness of a proposed general freight schedule or tariff of rates. The opinion of the court is based very largely upon tabulated statements showing the average reduction in gross earnings which would follow from an application of the proposed new freight tariff to the business of the road during the three years preceding. To what extent the court had before it the facts relative to the economic conditions of the country and probable earnings of the roads in
212 the future does not appear. It would rather seem that the evidence, if any, on these questions was very meager, so that the court would not speculate as to the future.

The case this commission is now dealing with relates altogether to a general maximum passenger rate, while in the Smyth case the questions dealt with by the court were greatly complicated by the application of an entirely new freight tariff to the business of the several roads in Minnesota. It is clearly shown in our case that a reduction in passenger rates will produce increased travel, so that the application of the proposed maximum passenger rate to the past business of the companies does not constitute a test which absolutely determines the result of the reduction in the maximum passenger rate. It is manifest that in the Smyth case the court did not have before it the full evidence on this point which has been adduced before the commission. Increased business following a reduction in rates is a circumstance which necessarily has more weight in considering a passenger rate than in considering a system of freight

rates; while freight traffic may be somewhat stimulated by a reduction of rates, yet the great bulk of it is controlled by general industrial conditions which apply with a less degree of force to passenger travel.

5. Another matter which is allowed consideration is the character of the administration of the road. If the organization and operation of the road has not been business-like and economical and fair, the company's objection to the rates of the legislature, or of the commission is greatly weakened. In other words, all the expenditures of the company of every character charged against the gross earnings may be carefully examined, analyzed and criticised, as well as all the items coming under the general head of operating expenses. In the Reagan cases it was declared that, if there has been waste in the management of the road, if the company has been paying enormous salaries or has been indulging in unjust discriminations, resulting in general loss, it cannot fairly object to a reduction in its rates. In the Wellman case, 143 U. S. 345, the court declared that they
213 should be fully advised as to what had been done with the earnings of the road, "for if so advised, it might clearly appear that a prudent and honest management would, even under the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends."

The foregoing are some of the leading circumstances and considerations by which we are to be guided in determining what maximum passenger rate would be a reasonable rate to apply to the railroads in Virginia in their intra-state traffic. To undertake to enumerate in great detail all the principles applicable to the rate cases as enunciated by the Supreme Court of the United States would require a most elaborate analysis of the various cases decided by that court, which would extend this opinion far beyond its proper limits. While reasonableness of the earnings of the railroad, which constitutes the crucial test in determining the validity of the proposed rate, must be judged by the principles so far laid down in the adjudications, yet in the end each case must depend upon its own circumstances. As was stated in the San Diego Land and Town Company case, quoting from the Covington case,

"each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating the rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law."

The commission recognizes clearly the general principle estab-
lished in *Smyth vs. Ames*, which seems to be now fairly well
214 settled; that is, that the railroad company is entitled to a fair return on the reasonable value of its property. What is the

reasonable value of the property upon which the railroad company is entitled to the fair return or earnings is to be determined in the light of the general considerations above mentioned, and by all the principles so far laid down by the courts in considering these questions. In *Smyth vs. Ames*, it is stated that in determining the value of the property used in the service of the public, and upon which a return is to be estimated, the following circumstances may be considered:

(1) The original cost of construction;

(2) The present, as compared with the original, cost of construction;

(3) The amount expended in permanent improvements;

(4) The amount, in market value, of the stocks and bonds issued by the corporation;

(5) The probable earning capacity of the road under the proposed rates;

(6) The amount of operating expenses; and

(7) Other matters which may be properly considered, according to the facts in each case.

The last consideration amounts to saying that each case must be judged by its own facts.

It is almost certain that the evidence before the commission presents every possible fact and consideration bearing upon the reasonableness of a maximum passenger rate of two cents per mile more fully and extensively than any of the cases which have been before the Supreme Court of the United States. After listening for several months with great care to the testimony adduced before the commission, and upon careful scrutiny of all facts appearing from the testimony, the tabulated statements and all other data and exhibits filed before the commission, we are of opinion that it will not unreasonably reduce the intra-state earnings of railroads in Virginia calculated upon a proper basis, should the commission put
215 into effect a maximum passenger rate less than the prevailing maximum rate, which, as to nearly all the roads, is three cents per mile.

The investigation on which the conclusions of the commission are based was perhaps the most extensive and exhaustive in its scope of any yet undertaken by rate-making bodies. The record in the freight rate cases, covering several thousand pages of typewritten matter, and the exhaustive record in the passenger rate cases, are considered together in so far as either of these records throws light on the subject before us. While the evidence has been carefully considered in its applicability to each individual company and its peculiar conditions, regarded separately, yet we do not deem it necessary or practicable to review all the evidence with the same detail in this paper, but will herein confine ourselves to an application to the evidence of those general principles which the courts have held should control the judgment and discretion of a rate-making body, deducing therefrom such conclusions as are fair, just and reasonable to the several groups of roads and dealing separately with

a company only when some peculiar fact or condition differentiates it from the others of the group to which it otherwise belongs.

Proceeding along this line, we recognize not only the binding force, but the justice of the general principle that a carrier has the right to earn its operating expenses, and a fair return upon a fair value of the property used in the service. In order to reach a result in this case which shall conform to this principle, a number of facts must be, as far as possible, ascertained and determined, among the most important of which are:

(1) The gross earnings of the carrier on all its Virginia business, both inter and intra-state;

(2) The expense of conducting such business;

(3) The gross earnings derived from its Virginia intra-state business;

(4) The expense of conducting such purely intra-state Virginia business;

(5) The fair value of the carrier's property used by it in all its Virginia business;

216 (6) The fair value of the carrier's property used by it in its intra-state Virginia business;

(7) A fair and reasonable margin of profit which the carrier should be allowed to earn upon its intra-state Virginia business.

It is manifestly impossible, in the very nature of the case, to ascertain exactly any one (except the third) of the seven matters above enumerated; but the testimony submitted by the defendant carriers in this proceeding, and the facts brought out in cross-examination by members of the Commission and by counsel for the Commonwealth enabled all those matters to be ascertained with sufficient practical accuracy for the purposes of this proceeding.

It may be proper to call attention at this point to the fact that, while the roads generally have stated their passenger *earnings* separately from their freight and other earnings, yet they have, with perhaps one exception, failed entirely to make any effort at a division between the *expense* of conducting passenger business and that of conducting freight, or other business. Thus we are without such information as will enable us to determine with accuracy the separate net profits of passenger, freight, mail, express and miscellaneous business, respectively. It is, therefore, necessary, in approaching a solution of the question before us, that we consider the earnings of the roads on all Virginia business of every kind on the one side, and the expense incurred in conducting all Virginia business of every kind on the other.

Taking up now the first of the said seven principal matters to be ascertained, namely, the gross earnings of the carrier on all its Virginia business, both inter-state and intra-state, it will be found that the evidence supplying this information, with reasonable accuracy, is furnished not only by the testimony of witnesses adduced in this proceeding, but by the operating reports of the several companies on file in the office of this Commission, and which are made a part of the record in these proceedings.

217 The establishment of the second principal fact above mentioned, viz: the expense of conducting the carrier's entire

Virginia business—both inter- and intra-state—has been attempted by all the roads with varying accuracy, though every company has included in its operating expenses items which are not properly so classified.

The third matter, as to earnings derived from all Virginia intra-state traffic, has been satisfactorily fixed, in the case of all the roads appearing in this proceeding by the testimony and statistics in the evidence; and some of the roads have undertaken to state separately their earnings from intra-state passengers and from intra-state freight.

We proceed, therefore, without difficulty until we reach the fourth principal matter, which is as to the expense of conducting purely intra-state business, freight, mail, express, passenger and miscellaneous. A great mass of testimony was submitted by several of the carriers in an effort to show that the cost of conducting intra-state business was materially greater than that of conducting all business, and therefore still greater than that of conducting inter-state business. Some of the roads claimed that this excess of expense on intra-state business was not less than fifteen per cent. of the expense of conducting all business of the system; others claimed that it cost not less than fifteen cents more to earn a dollar on intra-state traffic than on inter-state traffic. Some of the roads claimed that the excess cost was greater than this. It was contended on behalf of the roads that the Supreme Court of the United States had, in the case of *Smyth vs. Ames*, 169 U. S., page 466, established as a matter of law a particular ratio between the cost of different kinds of railroad business. That case, however, does not sustain any such construction, and the evidence in this case fails to show that the intra-state Virginia business of the railroads yields a smaller percentage of profit than does their inter-state business; and the Commission, upon the whole evidence, is of opinion that it is not so.

The argument advanced in support of the opposing theory is largely based upon the assumption that local traffic and intra-
218 state traffic are interchangeable terms; whereas, as a matter of fact, such is not the case, but, on the contrary, a large amount of intra-state traffic is carried by what might be termed "through movement," while a large amount of inter-state traffic, in whole or in part, by what might be termed "local movement."

It has been held by the Railroad Commission of Wisconsin, after an exhaustive investigation of the subject, that as much intra-state traffic is carried by through movement in that State as is carried by local movement, and that as much inter-state traffic is carried by local movement as by through movement. The evidence in this case shows that the same is very largely true as to Virginia traffic; hence we conclude that any evidence based upon the theory that intra-state traffic is approximately all local, or that inter-state traffic is approximately all through, is necessarily misleading.

It may be admitted, however, that a large proportion of intra-state traffic takes local movement, and is subject, therefore, to the relative high expense of short haul movement; but when we consider that the local or short haul rate is relatively much greater per ton per mile on a purely mileage basis than the through long haul rate, and

when to this is added the further fact that the local movements are usually conducted between small points unaffected by competition, while the through movements are usually between large points, and, therefore, more or less influenced by competition, we must see that the excess of the local over the through rate becomes still greater. When we consider these things, it is apparent that the difference in the rate in the two cases is certainly large enough to offset fully any probable difference in the cost of handling and transporting the two classes of traffic. Indeed, the existing short haul rates, which, as just stated, are rarely affected by competition, have always been fixed by the free and voluntary action of the carriers themselves, without restraint, and with a view to covering fully any excess cost which may be incident to traffic moving under these rates; and an examination of the rates applicable to short hauls will show that the traffic departments of the carriers have not been unmindful of
219 the difference between the cost of the short haul local movements on the one side, and the long through movements on the other, even though both movements are performed within the State. As illustrative of this, the testimony of Mr. Coxe, a witness of the Norfolk and Western Railway, shows that the average length of their through hauls was 230 miles, and the average length of their local hauls 68 miles; and the existing tariffs of that road show that the average charge per ton per mile under a 68-mile haul under the class rates is more than double the average charge per ton per mile on a 230-mile haul; and the same comparison when made between commodity rates illustrates the same principle. This is practically true of all the roads. From the evidence in these proceedings and from the considerations aforesaid, the commission finds that the profitableness of conducting intra-state freight traffic is proportionately not materially, if at all, less than the profitableness of conducting inter-state freight traffic.

So much for the freight traffic; but when we consider the passenger, mail, express and miscellaneous business of the roads, the case is much stronger. As a rule, the shorter hauls of passengers are conducted on the regular ticket rates, which are the higher rates; but the assumed additional cost of conducting local *freight* traffic, growing out of the fact that a great part of it must be handled in and out of cars and stations, will not apply to *passenger* traffic, since passengers handle themselves. In addition to this, there are many expenses connected with the through passenger service that are not connected with the local passenger service, such as vastly more expensive train equipment, the maintenance of passenger soliciting offices off the line of the road, the maintenance of a very much higher class of service, &c., &c.

We find that a large amount of intra-state passenger traffic is conducted on through trains, which are claimed to move at a minimum cost per passenger per mile. We find also that a considerable volume of inter-state passenger traffic is conducted on local trains, which are claimed to move at a higher cost per passenger per mile.

From these and other considerations, we cannot escape the
220 conclusion that the Virginia intra-state passenger traffic of each road involved in these proceedings is, in the aggregate,

fully as profitable, in proportion, to such road as is its inter-state passenger traffic. As to the mail and express business of the railroads, the evidence is clear, and from the nature of the business it is manifest that the local mail and express business, so far as the railroad company is concerned, costs no more than does the through mail and express business,—the rates being higher, however, on local than on the through, it follows that the local mail and express business of the roads is more profitable than the through.

Finally, the miscellaneous earnings of the road, consisting chiefly of such things as rentals, demurrage, switching, &c., are all purely local, and not, strictly speaking, items of transportation at all, but, in the matter of profitableness, this branch of the road's business is the same whether the traffic upon or in connection with which it is performed, is local or through.

Having seen that, all things considered, the profitableness of intra-state freight traffic in Virginia is proportionately not materially, if at all, less than that of inter-state Virginia traffic; that the profitableness of Virginia intra-state passenger, mail, express and miscellaneous business is proportionately not materially, if at all, less than that of inter-state Virginia passenger, mail, express and miscellaneous business, it follows that the profitableness of the *whole* Virginia intra-state business is proportionately not materially, if at all, less than that of the whole Virginia inter-state and intra-state business combined.

This conclusion is strengthened by consideration of the fact that the great bulk of the inter-state traffic in Virginia is of such character as is moved by the heaviest power and equipment, representing the heaviest burden, and which imposes the necessity for large expenditure of money on road-bed, track, bridges and terminals, thereby increasing the investment in property far beyond the figure which would be necessary if all traffic were of the same character as average intra-state traffic. To this may be added the fact that the cost of the heavier power and equipment used in transporting average inter-state traffic is also greatly in excess of the cost of power
221 necessary to, or actually used in, the movement of average intra-state traffic, to say nothing of the wear and tear on the rails and on the road-bed incident to the movement of heavier inter-state traffic.

Having thus compared the profitableness of Virginia intra-state business with that of Virginia inter-state business, and having seen that there is no material difference in the comparative profitableness of the two, it is plain that the entire operating expense of doing all business in Virginia should be apportioned between inter- and intra-state business, in the proportion which those branches of the road's business bear to each other in amount—that is to say, in the proportion which the gross earnings from inter-state business bears to the gross earnings from intra-state business: and since the intra-state Virginia business contains a larger proportion of short hauls than does the inter-state Virginia business, it follows that the amount of the road's plant—railroad and equipment—employed in earning one dollar of intra-state gross revenue is certainly not more—and is prob-

ably materially less—than that used in earning one dollar of Virginia inter-state revenue.

From these considerations it follows that the percentage of the entire expense of all Virginia business which Virginia intra-state business should bear, and the percentage of the entire property of the company employed in its Virginia business, upon which the intra-state Virginia business should be required to yield a fair return, is the same percentage which the gross earnings of the intra-state Virginia business bears to the gross earnings from all the Virginia business. When it is considered that the intra-state and inter-state business of the roads are inextricably mingled, being carried on by the same employees, at the same time, with the same plant and instrumentalities, over the same parts of the road, often in the same train, and not infrequently in the same car—when these things are considered, it is believed that no more fair, just, reasonable and correct basis can be found upon which to apportion the common burden and earning requirements of the whole business between the inter-state and intra-state branches thereof, than the basis above indicated, to-wit, that of gross earnings; and the Commission,
222 from a long and painstaking study of the facts and conditions, is of the opinion that if this basis is unfair to either branch of the business it is to the intra-state branch.

With a view to the application of this principle of apportionment to some of the principal roads in Virginia, we take the following tables:

1. NORFOLK & WESTERN RAILWAY COMPANY.

Virginia.

Miles operated, 1,054.00 miles.	Year 1906. Per mile of road.
Freight revenue	$12,829 15
Other freight earnings	27 88
Total freight earnings	$12,857 03
Passenger revenue	$2,147 99
Other passenger earnings	408 41
Total passenger earnings	$2,556 40
Total gross earnings	15,413 43
Operating expenses:	
Maintenance of way and structures	$1,721 71
Maintenance of equipment	2,728 25
Conducting transportation	4,459 69
General expense	283 86
Total operating expenses	9,193 51

Net income from operation	6,219 92
Other income from operation	99 93
Total income from operation	$6,319 85
Taxes	440 17
Balance	5,879 68
223 Interest on bonds	1,649 29
Balance for stock	4,230 39
Dividends on stock	1,879 98
Surplus	$2,350 41

2. CHESAPEAKE & OHIO RAILWAY COMPANY.

Virginia.

Miles operated, 736.9 miles.	Year 1906.
	Per mile of road.
Freight revenue	$10,195 13
Total freight earnings	$10,195 13
Passenger revenue	2,344 56
Other passenger earnings	435 10
Total passenger earnings	$2,779 60
Total gross earnings	12,974 73
Operating expenses:	
Maintenance of way and structures	$1,373 35
Maintenance of equipment	2,338 09
Conducting transportation	3,899 57
General expenses	223 81
Total operating expenses	$7,834 82
Net income from operation	$5,139 91
Other income from operation	230 76
Total income from operation	$5,370 67
Taxes	437 34
Balance	$4,933 33
224 Interest on bonds	3,307 41
Balance for stock	$1,625 92
Dividends on stock	536 76
Surplus	$1,089 16

3. Atlantic Coast Line Railroad Company.

Virginia.

Miles operated, 137.54 miles.	Year 1906. Per mile of road.
Freight revenue	$11,968 96
Total freight earnings	11,968 96
Passenger revenue	2,544 74
Other passenger earnings	319 40
Total passenger earnings	$3,064 14
Total gross earnings	15,033 10
Operating expenses:	
Maintenance of way and structures	$2,161 00
Maintenance of equipment	1,966 64
Conducting transportation	5,651 09
General expenses	417 80
Total operating expenses	$10,196 53
Net income from operation	4,836 57
Other income from operation	623 08
Total income from operation	$5,459 65
Taxes	343 74
Balance	$5,115 91
225 Interest on bonds	1,009 71
Balance for stock	$4,106 20
Dividends on stock	646 59
Surplus	$3,459 61

4. Seaboard Air Line Railway.

Virginia.

Miles operated, 157.50.	Year 1906. Per mile of road.
Freight revenue	$8,670 70
Total freight earnings	8,670 70
Passenger revenue	1,238 88
Other passenger earnings	453 21
Total passenger earnings	$1,692 09
Total gross earnings	10,362 79

Operating expenses:

Maintenance of way and structures	$1,020 15
Maintenance of equipment	1,231 65
Conducting transportation	3,882 61
General expenses	207 41
Total operating expenses	$6,341 82
Net income from operation	4,020 97
Other income from operation	78 04
Total income from operation	$4,099 01
Taxes	380 68
Balance	$3,718 33
Interest on bonds	1,076 11
Balance for stock	$2,642 22
226 Dividends on stock	
Surplus	$2,642 22

5. SOUTHERN RAILWAY COMPANY.

In Virginia.

Miles operated, 965.53. Year 1906.

	Per mile of road.
Freight revenue	$4,246 10
Total freight earnings	4,246 10
Passenger revenue	2,503 50
Other passenger earnings	962 92
Total passenger earnings	$3,466 42
Total gross earnings	7,712 52

Operating expenses:

Maintenance of equipment	1,083 69
Maintenance of way and structures	$1,082 65
Conducting transportation	2,595 02
General expenses	248 06
Total operating expenses	$5,009 33

Net income from operation	2,703 19
Other income from operation	183 21
Total income from operation	$2,886 40
Taxes	236 64
Balance	$2,649 76
Interest on bonds	1,393 86
Balance for stock	$1,255 90
Dividends on stock	601 26
Surplus	$654 64

227 6. RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY.

Miles operated, 83.20—all in Virginia. Year 1906.

	Per mile of road.
Freight revenue	$12,331 87
Total freight earnings	$12,331 87
Passenger revenue	6,953 07
Other passenger revenue	1,927 28
Total passenger earnings	$8,880 35
Total gross earnings	21,212 22
Operating expenses:	
Maintenance of way and structures	2,021 96
Maintenance of equipment	2,270 25
Conducting transportation	8,708 77
General expenses	560 28
Total operating expenses	$13,561 26
Net income from operation	$7,650 96
Other income from operation	
Total income from operation	$7,650 96
Taxes	10 86
Balance	$7,640 10
Interest on bonds	1,256 25
Balance for stock	6,383 85
Dividends on stock	3,171 16
Surplus	$3,212 69

228 7. WASHINGTON-SOUTHERN RAILWAY COMPANY.

In Virginia.

Miles operated, 33.83. Year 1906.

	Per mile of road.
Freight revenue	$14,559 14
Total freight earnings	14,559 14
Passenger revenue	6,015 26
Other passenger earnings	2,502 54
Total passenger earnings	$8,517 80
Total gross earnings	23,076 94
Operating expenses:	
Maintenance of way and structures	$1,851 56
Maintenance of equipment	2,410 81
Conducting transportation	12,446 51
General expenses	547 27
Total operating expenses	$17,256 15
Net income from operation	5,820 79
Other income from operation	91 04
Total income from operation	$5,911 83
Taxes	524 34
Balance	5,387 49
Interest on bonds	4,456 24
Balance for stock	$931 25
Dividends on stock	2,177 21
Surplus	

229 8. NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

In Virginia.

Miles operated in Virginia, 95.00. Year 1906.

	Per mile of road.
Freight revenue	$13,227 28
Other freight earnings	193 44
Total freight earnings	$13,420 72

Passenger revenue	2,424 11
Other passenger earnings	978 28
Total passenger earnings	$3,402 39
Total gross earnings	16,823 11
Operating expenses:	
Maintenance of way and structures	$2,170 87
Maintenance of equipment	2,257 58
Conducting transportation	6,245 22
General expenses	657 49
Total operating expenses	$11,331 16
Net earnings from operation	$5,491 95
Other income from operation	13 65
Total income from operation	$5,505 60
Taxes	313 23
Balance	5,192 37
Interest on bonds	1,285 71
Balance	$3,906 66
Dividends on stock	1,964 28
Surplus	$1,942 38

230 From an inspection of these tables, it will be seen that the Norfolk and Western Railway Company shows gross earnings for the year ending June 30, 1906, on all its Virginia business, of $15,413.43 per mile, and net earnings on the same business of $5,879.68 per mile, all based upon the freight and passenger rates in effect during that fiscal year. From this it appears that the net income of this line is a little more than 5⅞ per cent. on a valuation of $100,000 per mile of its 1,054 miles of track located and operated in Virginia.

That the Chesapeake and Ohio Railway Company for the same year, figured on the same basis, shows gross earnings of $12,974.73 per mile, and net earnings of $4,933.33 per mile; giving a net income of approximately 5 per cent. on a valuation of $100,000 per mile on its 736 miles of track located and operated in Virginia, some 85 miles of which is mere trackage rights over the lines of the Southern and Washington Southern Railroad Companies from Orange to Washington.

That the Atlantic Coast Line Railroad Company, for the same year, figured on the same basis, shows gross earnings of $15,033.10 per mile, and net earnings of $5,115.91 per mile, giving a net income of approximately 5⅛ per cent. on a valuation of $100,000 per mile of its 137 miles of track located and operated in Virginia;

That the Seaboard Air Line Railway Company, for the same year, figured on the same basis, shows gross earnings of $10,362.79 per

mile, and net earnings of $3,718.33 per mile, giving a net income of approximately 3¾ per cent. on a valuation of $100,000. per mile of its 157 miles of track located and operated in Virginia;

The Southern Railway Company, for the same year, figured on the same basis, shows gross earnings of $7,712.52 per mile, and net earnings of $2,649.76 per mile, giving a net income of approximately 2⅝ per cent. on a valuation of $100,000. per mile on the 965 miles of track located and operated in Virginia; the expenses of some 75 miles of which, from Orange to Alexandria, are partly borne by the Chesapeake and Ohio Railway Company;

231 The Richmond, Fredericksburg and Potomac Railroad Company shows gross earnings of $21,212.22 per mile, and net earnings of $7,640.10 per mile, or approximately 7⅝ per cent. on $100,000. per mile of its 83 miles of track located and operated in Virginia;

That the Washington-Southern Railway Company shows gross earnings of $23,076.94 per mile, and net earnings of $5,387.49 per mile, or approximately 5⅜ per cent. on $100,000. per mile of its 36 miles of track located and operated in Virginia, after deducting a grossly exorbitant charge for its interstate traffic over the Potomac River bridge, which, as well as the Washington-Southern Railroad, is controlled by the Pennsylvania Railroad Company;

That the New York, Philadelphia and Norfolk Railroad Company shows gross earnings of $16,823.11 per mile, and net earnings of $5,192.37 per mile, or approximately 5 1-5 per cent. on $100,000. per mile, after making many unusual and unwarranted deductions from net income.

These amounts are based upon the companies' own figures, but in most, if not in all, cases it appears from the evidence that many thousands of dollars included by the roads in these operating expenses and other deductions from gross revenue in order to arrive at their net revenue as they report it, should not, for the purpose of this proceeding, have been deducted from the gross revenue. And the commission finds from the evidence, that, as a matter of fact, the net revenue of each road is more, and in some cases very considerably more, than that reported by them as given in the foregoing tables. In view, however, of the fact that even the roads' own reports of their respective net revenues amply justify the action of the commission in this proceeding, the commission does not deem it necessary in this paper, to discuss or point out the extent to which the real net revenues of the several roads is greater than they calculate and report it.

Assuming, for the moment and for the purpose of comparison, that 6 per cent. is an adequate net return on the value of the property of the roads above enumerated, it appears that this rate is

232 being earned by the several roads on the following valuations per mile respectively, stated in round figures:

Norfolk and Western Railway Company, 6 per cent. on $98,000. per mile.

Chesapeake and Ohio Railway Company, 6 per cent. on $82,000. per mile.

Atlantic Coast Line Railroad Company, 6 per cent. on $85,000. per mile.

Seaboard Air Line Railway Company, 6 per cent. on $62,000. per mile.

Southern Railway Company, 6 per cent. on $45,000. per mile.

Richmond, Fredericksburg and Potomac Railroad Company, 6 per cent. on $127,000. per mile.

Washington-Southern Railway Company, 6 per cent. on $90,000. per mile.

New York, Philadelphia and Norfolk Railroad Company, 6 per cent. on $85,000. per mile.

It must be borne in mind that roadbed and track as shown in miles is not the only investment of these companies; to this chief item of costs must be added also the fair value of equipment, station buildings, freight depots, warehouses and terminals, and any other item of property which *are* necessarily incident to conducting a transportation business. It is difficult to ascertain the exact values of these last named items, but taking the assessed value of these items for taxable purposes in Virginia, as shown by the records of this commission, and distributing this value on a mileage basis, it is found that it only represents the sum of $3,797.78 per mile on the Southern Railway, which is the only road in the group, which is on an earning basis low enough to be possibly affected by this question.

Having shown by the above tables the net earnings per mile of the roads named respectively, on their entire Virginia business, and that no greater percentage of the company's plant is employed in earning a dollar of intra-state gross revenue than in earning a
233 dollar of interstate revenue, it follows that, if the net earnings of the companies from all their Virginia business, yield them a certain return upon a given valuation of their property employed in earning that revenue (as the figures just given show), then the net earnings upon the intra-state branch of that business must also yield the same return upon a similar valuation of the property employed in earning that intra-state revenue.

We now reach the question as to how far the net income of the several roads as above shown may be regarded as a fair and reasonable return upon a just and fair valuation of the property employed in earning it; and in order to answer this question, we must ascertain and determine what is a fair valuation of such property. Various bases have been suggested and considered by courts and rate making bodies for the ascertainment of the values of railroads and railroad properties.

The bond and stock basis has been suggested; but this is probably the most unreliable and untrustworthy of all measures of value of the property.

The cost of original construction has also been suggested; but this method is subject to various objections, among which is the consideration that the facts from which to determine original cost are usually too remote to be available. Even the cost of reproduction is not always a fair or reliable criterion, seeing that the market price of property, labor and material is a variable and constantly fluctu-

ating quantity; and even if it were not, yet, whether the basis should be the cost of reproduction of the property anew, or the cost of reproduction of the property in its present state, is a question of much difficulty and doubt.

Since the roads by their accounting methods, charge enormous sums annually to maintenance of roadway and structures, and to maintenance of equipment, the aggregate of which sums is annually deducted from the gross revenues in arriving at the reported income, and has been deducted in each case from the net incomes above given, it would seem that they have protected themselves and are continuing to protect themselves financially against the con-
234 sequences of natural depreciation of their property. The evidence shows that as to most, if not all, of the roads, even improvements and betterments were to a greater or lesser extent deducted also from the gross revenues before arriving at the reported income.

Under the laws of this State it was, for many years, the duty of the Board of Public Works, composed of the Governor, the Auditor of Public Accounts and the Treasurer of the Commonwealth, to assess for taxation the value of all railroad property in this State; for four years past this duty has devolved upon this commission, which, in the performance thereof, has made careful personal inspections of all the railroad property in the State, and availed itself of every practical source of information as to the true value of that property, and have assessed it as the facts and circumstances of the case would, in their opinion, justify, with a view of deriving therefrom for the State the fair amount of taxes, to which, under the law, it was entitled. In these annual assessments, the interests of the State is naturally in the direction of increasing, while that of the railroad companies is equally in the direction of diminishing, the value of the railroad property, therefore, it would seem but reasonable to assume that the amount of such assessments should certainly not be regarded as unreasonably low, at least so far as the railroad companies are concerned.

The assessment of railroad property in Virginia under the old Board of Public Works was in no single instance more than $15,000.00 per mile, and, under this commission, has never been up to and including the year 1906 more than $16,000.00 per mile on single track roadway proper, and in many instances it is much less.

The Commission does not hold that the taxable value of railroad property and its commercial value is or should be the same, any more than in the case of any other property, but it is manifestly true that such values should bear some reasonable relation to each other, and that the assessed value of such property as ascertained year after year in this State and in many others, where conditions are
235 similar, and with reference to many different roads, should be considered and given due weight—not as alone determining, but—as an element and a very important element in determining the true commercial value of such property. Assessments may indeed be erroneous, but it is wholly improbable that when the

assessments made by States for the purpose of taxation are considered with reference to many different years, and for many different roads, it would be found that the State, for every year and every road, has made an error against itself and in favor of the road, and still more improbable would it be that the railroads had first discovered and pointed out the error.

One of the important duties of this Commission is to constantly inspect all the railroads of this State and to keep itself thoroughly posted with reference to the physical condition of the track, roadbed, structures and equipment of such property. This duty has been conscientiously and regularly performed by this body for a number of years. The necessary result of this has been to inform and keep informed this Commission of the condition and value of the railroad property of this State, as fully as any personal knowledge of property could enable one to judge of its value. This personal knowledge the Commission deems it right and proper that it should—not rely absolutely upon, but should—avail itself of in arriving at a fair and just estimate of the true commercial value of the property.

Few or no questions are more delicate or difficult of determination than the true commercial value of railroad property as a proper basis for rate fixing. Many persons have sought to evolve some simple and ready rule for making the estimate, and many different criteria have been suggested; but, in the opinion of this Commission, there is no single element or consideration which can be accepted as a safe or reliable guide, but that due weight and consideration must be given to many different ones.

The law as laid down by the courts requires the ascertainment of *some* value of the property as a basis upon which, as a matter of constitutional right, the company is entitled to earn a fair
236 return—in any event, at least so far as that can be done with reasonable rates. The law must contemplate then that there is some practicable method by which this value can be ascertained, and this Commission knows of no better, or more reliable method than to give due and proper consideration and weight to the following matters among others.

1st. The original cost of the property so far as it is shown.

2nd. The amount of the capital and bonded debt of the company applicable to the property in this State.

3rd. The market value of such stock and bonds.

4th. The cost of reproducing the property anew so far as it is shown.

5th. The cost of reproducing the property in its present condition so far as it is shown.

6th. The properly assessed value of the property for purposes of t-xation.

7th. The personal knowledge of the property by the Commission.

No one of these considerations should control, but due weight should be given to each. That some are entitled to much more weight than others is obvious, and that some are more easily ascertainable than others is equally obvious. For instance, the original cost of a railroad and its equipment is often absolutely unascertain-

able, and it is wholly impracticable to ascertain the cost of reproduction—either anew or in its present condition. Even if all of these matters were known, they could not safely be relied upon absolutely, because in many cases, particularly in this State, the property was acquired by the present owner at much less than its original cost or at which it could now be reproduced in any form.

Probably the most unreliable and misleading of all the foregoing considerations is the amount or present market value of the stock and bonds of the road. It is well-known that railroad stocks are rarely, if ever, issued for full value. In fact the general rule is that the money put into railroad property is wholly represented by its bonds, the stock being issued as a bonus and represents the
237 control, rather than the contribution to the property. Even when this is not fully true, it is impossible to tell to what extent it is true, especially when the present company, as is often the case, is the result of the merger, consolidation or re-organization of one or more corporations. Nor should the present market value of the stock at all be a controlling guide; because that value is constantly fluctuating, is readily and often manipulated, and depends much more upon the earning capacity of the road than upon the value of the property employed. It would, therefore, be but reasoning in a circle to fix the earning capacity by the value of the property employed, and then, in turn, ascertain that value by the earning capacity as reflected in the market value of the securities.

These are the considerations which have led the Commission to consider all the foregoing matters as well as everything else in the evidence tending to throw light upon the question, but to give varying weight to each consideration, their final judgment being a composite result of them all.

By this process, the Commission has arrived at the conclusion that the entire Virginia property of no railroad company assessed by it is really worth more than $50,000.00 per mile for the entire mileage in this State, while the property of most of such companies is worth less. The Southern Railway Company's entire property, composed as it is, largely of branch lines of cheap construction and not well maintained, on which is operated light and rather cheap class of equipment, is, in the opinion of the Commission, worth greatly less on its entire mileage in this State. The assessments of the property of the Southern Railway, made by the Commission for the year 1906, are as follows:

Roadway and track	$11,348.15 per mile.
All other property	3,797.78 per mile.
Total assessment of physical property	$15,145.93 per mile.

The Virginia revenue law provides for the payment an-
238 nually of a franchise tax at a rate of one per cent. on Virginia gross transportation receipts of the railroads. If we consider the amount of this franc*ihse* tax paid by the Southern Railway to the State, and capitalize it on the basis of $1.25 per $100.00 (estimated to be the minimum average rate of taxation in

Virginia, State, county and municipal, on property generally), we would have the additional sum of $5,708.45 per mile. Adding this sum to the assessed value of all the physical property above given, we have a total valuation of $20,854.38 per mile, reached upon a basis which puts the Southern Railway upon the same plane as other tax payers of the State. The Commission is clearly of opinion that the franchise tax should not be considered in this connection, and only includes it in the figures above given for the purpose of showing the outside valuation of the Southern Railway for taxable purposes from any standpoint from which the subject might be considered.

The Commission does not propose to fix for each road, or any of them, the *least* sum to which they could be restricted as a basis for earning capacity, without transgressing the constitutional limit of confiscation. As to how far this side of that limit the regulation should stop, is, in the opinion of *of* the Commission, a matter of legislative discretion to be exercised by it as it deems wisest and best for the public welfare, not overlooking the fact that the railroads themselves and the holders of their securities are a part, and a very important part of that public.

In the exercise of this discretion, the Commission deems it the height of unwisdom and mistaken policy to restrict the railroad companies to the utmost point legally permissible or anywhere near that point. On the contrary, the Commission deems it manifestly wise and proper that the railroads, as one of the greatest engines of civilization and prosperity, on the successful operation of which practically every industry and every community is largely dependent, should be given every reasonable encouragement and dealt with as liberally as the public interests and the welfare of their patrons will permit.

239 The Commission, therefore, in its final action in these proceedings has been guided by these considerations and has decided upon the reduction in the maximum limit to passenger fares which it orders only after assuring itself, that, even if such reduction is not fully compensated by the consequential increase in business the roads will still be left, upon their intra-state Virginia business, such a margin of profit upon any fair value of the property employed as will enable their business to compare favorably in profitableness with any of the large, or standard, businesses of the country, and not even approach anywhere near the legal limit of confiscation.

But the Commission is convinced from the evidence in these proceedings, that this reduction in the maximum limit of passenger fares, when put into effect in good faith by the carriers, will not result in such a loss of revenue as would first appear from a consideration of the difference between the present maximum and the one proposed.

No branch of transportation is so responsive to lower fares as the carrying of passengers. Of course, there is a certain amount of travel which is compelled to move regardless of fares; but a very large amount of railroad traveling is the direct result of attractive rates which enable and encourage people to move about. None are better aware or more appreciative of this fact than the railroad com-

panies themselves, who, to encourage and increase this travel, have for many years voluntarily sold a large part of their transportation at very much less than the existing maximum limit of three cents a mile. In fact, the evidence shows that but a comparatively small part of the rates actually realized are as much as three cents, and that a very large part of them have long been from two cents a mile down. In States where a maximum limit has been established by law within the last one or two years, some roads have voluntarily withdrawn all their previously existing rates of less than two cents, thus cutting themselves off from the benefit of all the traffic for which these low rates were designed, and which moved only because of it.

These lower rates consisted for the most part of excursion
240 rates and special rates to fairs, conventions, and other public gatherings. It is perfectly obvious that the roads had theretofore granted these lower rates because of the plain business considerations that it was better to carry the people, for whom these fares were designed, at these low rates than not at all, and that this kind of passenger traffic only moved under and because of these low rates, in view of the fact that it was not obliged to move at all. These considerations are obvious just as applicable and controlling under a two-cent maximum as under a three-cent maximum, and therefore those roads which, for any reason, withdrew their former rates of less than two cents, did so voluntarily and not because the two cent limit required or forced them to it, and thus by their own act deprived themselves of that large and profitable part of their passenger traffic which only moves because of these low rates. Except when this was done, the evidence fails to show that any standard road has suffered any substantial diminution, but shows that some of them have derived a positive increase, of their passenger revenues under a two-cent maximum fare as compared with their revenues under a three-cent maximum fare.

After a careful study of the evidence and of the entire railroad situation in this State, the Commission believes, under the maximum limit of passenger fares as prescribed by it in this proceeding,

First. That the revenues of the railroad companies affected will not be necessarily diminished as compared with their existing revenues, but may be increased;

Second. That, if their revenues be in fact diminished thereby, they will not be sufficiently diminished to work any unjust or unreasonable deduction in their net earnings; and

Third. That since the effect of such maximum limit will not be to work a greater reduction in the companies' net earnings than they could be just and reasonably called upon to bear, such reasonable reduction should be applied as far as practicable, to such rates as are best able to bear it, and most generally affect public interest. Applying this principle to the evidence in the case, so far as
241 adduced, we reach the conclusion, and there is little, if any, evidence to the contrary, that it is proper to make the bulk of reduction in passenger fares, especially since such reduction will be more surely and readily compensated for by increased business, than if a similar reduction had been made in other classes of traffic. The increased passenger revenues which must necessarily result

from the withdrawal of free transportation under the operation of recently enacted laws, may be an item worthy of consideration in this connection.

So long as a company earns a satisfactory net profit from all of its intra-state business, taken in its entirety, it cannot legally or reasonably complain that more of this profit is earned out of one particular branch of that business than out of some other branch. As to which branch of intra-state business, or what particular item or items of transportation, should bear the heaviest, and which the lightest burdens, considered from the standpoint of public interest, is for the commission, and not for the railroad companies to decide, so long as the aggregate net revenue left to the companies is adequate, just and reasonable.

The commission is of opinion that a maximum rate of two cents per mile for the transportation of all intra-state passengers is not unreasonably low for the roads enumerated in the tables above given, numbered from 1 to 8, inclusive, considering the proportionate value of the property used by them in intra-state business and the character of service rendered to intra-state passengers. These roads will be specified by name in general schedule "A," hereinafter appearing. This conclusion is based upon the business of the roads, respectively, as shown by the evidence in this case, and by the operating reports for the years 1905 and 1906. It is true that the net earnings of the several railroads enumerated in this group are variable as to amount, and the presumption might arise that the roads showing the smaller earning power should not be classed with those showing the larger. We feel that this view is defeated by the fact that the larger earning roads, with one or two exceptions, are using property
242 of much greater value per mile than that used by the smaller earners. In view, however, of the fact that the net income per mile of the Southern Railway Company is small in comparison with the other roads in the same group, it is deemed reasonable to allow, and there will accordingly be allowed, a maximum rate of two and one-half cents per mile for intra-state passengers transported on the following divisions, or branches, of the said Southern Railway Company, viz:

Norfolk Division, extending from Pinner's Point to Danville, 204 miles;

Franklin Branch, extending from Franklin Junction to Rocky Mount, 37 miles;

Claremont Branch, extending from James River Junction to Claremont, 50 miles.

So that the two and one-half cent rate will apply to 291 miles, or 30 per cent. of Virginia mileage of the Southern Railway Company.

From a careful consideration of the evidence in this case, and of the operating reports of the Virginia and Southwestern Railway Company, and Louisville and Nashville Railroad Company, we feel constrained to include, and accordingly will include them in the group of roads which are limited to a maximum passenger rate of two cents per mile. The operating reports of these two roads, on their face, might not seem to justify this reduction; but the facts

appearing on cross examination relative to the method of accounting in use by these two roads fully justify a reduction of their passenger rates to two cents per mile, and they will so appear in general schedule "A."

The commission is further of opinion that a maximum passenger rate of three cents per mile should be observed as to intra-state passengers by the Winchester and Potomac Railroad Company, Winchester and Strasburg Railroad Company, and the Valley Railroad Company of Virginia. It having appeared in the evidence that a mileage book is sold by the Baltimore and Ohio Railroad Company at a rate of two cents per mile, available on these three roads, it is thought that this voluntary reduction, taken in connection
243 with the slight one herein made, is as much as the financial showing of these roads will justify at present. These roads appear in general schedule "B." In this connection it might be proper to state the net income of these three roads from all sources for the year ending June 30, 1906, as shown by the operating reports on file in this office, are:

Valley Railroad Company of Virginia, 6 per cent. on a valuation of $14,000 per mile.

Winchester and Potomac Railroad Company, 6 per cent. on a valuation of $17,500 per mile;

Winchester and Strasburg Railroad Company shows a deficit after paying operating expenses.

If we treat these three lines as a part of the Baltimore and Ohio System, and consolidate their earnings, we find that under the maximum passenger rate of three and one-fourth cents now in effect on these roads, the Baltimore and Ohio net earnings from all Virginia business, inter- and intra-state, is on a basis of 6 per cent. on less than $14,000 per mile. The fact that the Baltimore and Ohio Railroad Company is a large and powerful system in other States, would not seem to affect the question before us, at least from the standpoint of the legal limitations of the rate-making power of Virginia.

These statements are not regarded by the commission as fairly representing the earnings of these roads, but, even when properly analyzed, are not such as to justify further reduction at present.

The commission is further of opinion that a maximum passenger rate of three cents per mile should be observed as to intra-state passengers by the Norfolk and Southern Railway Company, and the Virginia and Carolina Coast Railroad Company, now operated by said Norfolk and Southern Railway Company. The net income of the Norfolk and Southern Railway Company from all sources for year ending June 30, 1906, as shown by its operating report on file in this office, is $805.85 per mile, which is on a basis of 6 per cent. on a valuation of about $13,000 per mile. The net income of the Virginia and Carolina Coast Railroad for the same year is very
244 much less. Under these conditions the commission does not feel warranted in reducing the maximum rate on these two roads below three cents per mile. These roads also appear in general schedule "B."

The commission is further of opinion that a maximum passenger rate of three cents per mile should be observed as to intra-state pas-

sengers on all roads embraced in general schedule "B," and that a maximum passenger rate of three and one-half cents per mile should be observed as to intra-state passengers on all independent narrow-gauge steam roads, and on all independent broad-gauge roads less than ten miles in length. These roads appear in general schedule "C."

General Schedule Showing Rates of Passenger Fares for the Several Steam Roads Operating in Virginia, as Ordered by the State Corporation Commission.

SCHEDULE A.—(2 CENTS PER MILE.)

Norfolk and Western Railway Company,
Chesapeake and Ohio Railway Company,
Atlantic Coast Line Railroad Company,
Seaboard Air Line Railway,
Southern Railway Company,
Richmond, Fredericksburg and Potomac Railroad Company,
Washington-Southern Railway Company,
New York, Philadelphia and Norfolk Railroad Company,
Virginia and Southwestern Railway Company,
Louisville and Nashville Railroad Company.

Except that a maximum rate of two and one-half cents per mile will apply on the following divisions or branches of the Southern Railway Company:

Norfolk Division, extending from Pinner's Point to Dan-
245 ville, 204 miles, exclusive of so much of the said division as may be in the State of North Carolina.

Franklin Branch, extending from Franklin Junction to Rocky Mount, 37 miles.

Claremont Branch, extending from James River Junction to Claremont, 50 miles.

SCHEDULE B.—(3 CENTS PER MILE.)

Chesapeake-Western Railway,
Cumberland Valley and Martinsburg Railroad Company,
Danville and Western Railway Company,
Indian Creek and Pound River Railroad Company,
Marion and Rye Valley Railway Company,
Nelson and Albemarle Railway Company,
Valley Railroad Company of Virginia,
Virginia-Carolina Railway Company,
Virginia Southern Railroad Company,
Winchester and Potomac Railroad Company,
Winchester and Strasburg Railroad Company,
Norfolk and Southern Railway Company.

SCHEDULE C.—(3 1-2 CENTS PER MILE.)

Big Sandy and Cumberland Railroad Company,
Big Stone Gap and Powell's Valley Railway Company,
Black Mountain Railway Company,
Interstate Railroad Company,
Lick Creek and Lake Erie Railroad Company,
Mt. Airy and Eastern Railway Company,
New River, Holston and Western Railroad Company,
Potomac, Fredericksburg and Piedmont Railroad Company,
Surry, Sussex and Southampton Railway Company,
Tidewater and Western Railroad Company,
Virginia Anthracite Coal and Railway Company,
Virginia and Kentucky Railway Company,
Wise Terminal Company.

246 It has been urged by the carriers that the prices of material and labor have greatly increased during the period of this investigation, and are continuing to increase since the evidence in the case was taken. Examination shows, however, that, in practically all cases, the gross earnings of the roads are also increasing, and that the most that can be said as to this claim, when properly analyzed, is that the profits on increased gross earnings are being absorbed by increased charges for labor and material, though the commission is not prepared to find that even this is wholly true. In the case of some of the roads, such for instance as the Southern, it is found that they are failing to accept and carry much of the intra-state Virginia traffic originating on their lines, or tendered to them by connecting lines, and which is now making urgent demand upon them for transportation. This failure to transport traffic tendered, and naturally tributary to them, is not found to exist on those roads which are conducting the largest amount of business, but on the roads which are handling along their tracks, a volume of traffic below the average. It would appear from the evidence that if many of the roads which complain of lack of revenue would utilize fully, as they should, the improved facilities now owned by them, both of power and equipment, in the transportation of traffic already offered to them, the profit arising from increased business would soon take care of any increase in the cost of material and labor.

The State of Virginia and the whole South is throbbing with energy and enterprise, and teeming with traffic as never before. The field of opportunity for railroad companies has widened and continues to widen beyond the most sanguine expectations of their official heads, and admittedly far beyond their present state of preparedness. We have shown that the net profit arising from the handling of this greatly increased and increasing traffic, even under the reduction herein ordered, will be equal to, if not greater than that enjoyed by other standard and legitimate business in the country. It is inconceivable that the carriers should, under these conditions,

247 find themselves unable to command the financial credit necessary to the performance of their public duties, and to the provision of such increased facilities in the nature of track,

terminals and equipment, as may be necessary to keep pace with the expansion of traffic, of which they are to become the beneficiaries.

VIRGINIA, *City of Richmond, To-wit:*

We, R. R. Prentis and R. T. Wilson, Chairman, and Clerk, respectively, of the State Corporation Commission of Virginia, do hereby certify that the foregoing is a full, complete and true copy of the written opinion of the said Commission which is referred to in the last order contained in the foregoing transcript of record, and which opinion, by said order, is made a part of the record of the proceeding in which said order was entered.

In testimony whereof, we have hereunto set our hands, and affixed the seal of the said State Corporation Commission, this the 25th day of June, 1907.

[Seal of the State Corporation Commission of Virginia.]

ROBERT R. PRENTIS,
Chairman.
R. T. WILSON, *Clerk.*

This day R. T. Wilson, Clerk of the State Corporation Commission of Virginia, to me personally known, appeared in person before me, the undersigned, a Notary Public in and for the City of
248 Richmond, in the State of Virginia, and, before me, in my said city, subscribed and made oath to the foregoing certificate.

In testimony whereof I have hereunto set my hand and affixed my official seal this, the 25th day of June, 1907.

[NOTARIAL SEAL.] JNO. S. EGGLESTON,
Notary Public.

249 *Decree Directing Coupons to Issue to Purchasers of Tickets, &c., and Continuing Restraining Order Awarded May 8th, 1907.*

Entered and Filed June 29th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

This cause came on this day to be heard on the papers formally read, and on the application of the complainant herein, in obedience to, and in accordance with, the sixth paragraph of the restraining order granted in this cause on the eighth day of May, 1907, and, because of other business requiring the attention of this court, it being impossible for the court to hear and determine the motion for

an injunction *pendente lite* until after the first day of July, 1907, the date fixed in the said order of the State Corporation Commission of Virginia for the rates thereby prescribed to go into effect, and to the end that the rights of no one shall be impaired, and that the status of all parties affected by this litigation shall be preserved, it is now ordered that the complainant shall give to any person purchasing a ticket for intrastate travel on its lines in the State of Virginia, and to any person purchasing a mileage book for travel on its lines in the State of Virginia, but not good outside of said State, a transferable coupon, or other written or printed evidence, representing the sum which such person, or his transferee, will,
250 upon a final decision in this cause upholding the validity of the said order of the said Corporation Commission of Virginia, be entitled to receive, out of the cash deposit to be made by the complainant in the registry of this court as may be hereafter ordered by the court.

The form of said coupon, or other written or printed evidence, shall be substantially as follows:

"Southern Railway Company

"*Virginia Ticket Claim Coupon.*

"To be Retained by Passenger. Not Good for Passage.

"Issued under an order of the Circuit Court of the United States for the Eastern District of Virginia in a suit therein pending between Southern Railway Company, Complainant, and Beverley T. Crump *et al.*, Defendants.

"Southern Railway Company has, on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated in such ticket within the State of Virginia to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by the order of the Corporation Commission of Virginia of April 27th, 1907, and is payable only on the order and out of the registry of said court, upon surrender to the court of this coupon, and upon such conditions, if any, as said court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

"In case the ticket with which this coupon corresponds is presented for redemption, it must be presented at General Passenger Agent's office, Washington, D. C., accompanied by this coupon either for surrender or for appropriate notation."

But nothing herein contained shall be construed as requiring the complainant to issue any such coupon or any such other written or printed evidence, in connection with the sale of any mileage book, or any ticket, good for an interstate passage, or for passage in another state or in other states.

2. That the complainant shall preserve to be produced whenever so ordered by the court herein, all canceled tickets in respect to which such coupons, or other written or printed evidence, may have been issued, and may be outstanding, and shall, from
251 time to time, report to the court, at intervals to be fixed by an order of the court herein, statements showing the revenue by it charged and collected for its services in the Virginia intrastate transportation of passengers, in excess of the amount permitted by said order of April 27, 1907, of the Virginia State Corporation Commission.

3. That the restraining order heretofore awarded in this cause, on the eighth day of May, 1907, be, and the same is, hereby continued until the further order of this court.

J. C. PRITCHARD,
June 29th, 1907. *U. S. Circuit Judge.*

Decree Enlarging Time to August Rules, 1907, for Defendants to File Demurrers, Pleas, or Answers.

Entered and Filed June 29th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

THE SOUTHERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

The defendants herein having been, by Rule hereinbefore awarded by the Honorable Jeter C. Pritchard, one of the judges of this Court, required to appear at the City of Asheville, in the State of North Carolina, on June 27th, 1907, to show cause, if any they
252 can, why a preliminary injunction be not awarded herein, as prayed for in the Bill; and said defendants, in obedience to said Rule, having accordingly appeared by counsel at the said city of Asheville on June 27th, 1907, and filed an answer to said Rule, denying the jurisdiction of the Court in this cause; and said judge, in chambers, having thereupon begun the hearing of the motion for said preliminary injunction upon said Rule and Answer and the evidence submitted therewith by the parties; and it being manifestly impossible to conclude said hearing until after the July Rules, 1907, of this Court; therefore, on motion of the said defendants, by counsel, and without waiving any of their objections to the jurisdiction of this Court, it is, for cause deemed good and sufficient by the said judge of this Court, ordered that the time for filing demurrers, pleas, or answers in this cause be, and the same is hereby, enlarged and extended to the August Rules, 1907, of this Court, but without prejudice to any of the rights of the defendants herein, or any of them.

J. C. PRITCHARD,
June 29th, 1907. *U. S. Circuit Judge.*

253 *Affidavit of M. M. Richey, Manager of the Southern Railway Company, on Behalf of Complainant.*

Filed July 1st, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

M. M. Richey, being first duly sworn deposes and says:

That he is Manager of the complainant, Southern Railway Company; that he has had experience in railroad life for about thirty two years, and during that time has occupied the positions of brakeman, fireman, switchman, general yard master, locomotive engineer, local freight conductor, passenger conductor, train master, Division Superintendent, general superintendent and Manager; that he commenced his railroad life with the Pennsylvania Railroad Company; was then with the Big Four; then with the Lake Erie and Western, sixteen years; then with the Chicago, Lake Shore & Eastern; then with the Central Railroad of New Jersey; and began service with the Southern Railway Company in the Fall of 1902, and with the exception of ten months has been with the Southern Railway
254 Company in various capacities ever since; that during the excepted ten months he was First Vice President of the Sloss-Sheffield Coal & Iron Company; that he is well acquainted with the duties of the ticket agent and of passenger conductors, and that for such ticket agents and such conductors to take the names and addresses of all the persons to whom tickets or passage for intrastate travel in the State of Virginia, would be sold, would not only tend to greatly inconvenience the public but would interfere with the orderly conduct of the company's affairs and would so impede the travel and the conduct of the business of the company that it would be for all practical purposes impossible. It would, of course, be possible in times of very light travel, and wherever there was no considerable number of persons applying for tickets; but any considerable number of persons applying it would be impossible for the sellers of the tickets, or for the conductors to stop and take the names and addresses of the passengers. This would be particularly true of local trains making frequent stops. Sometimes it is as much as a conductor can do to get through his train between stations, and we often find in practice that we have to slow up a train in order for them to get through their work between stations, without taking their names and addresses. Frequently applicants for tickets would arrive at a station a short time before the train leaves, and if the ticket agent was obliged to take all their names and addresses it would be impossible to get the ticket sold without delaying the train and this would result frequently in passengers being left at stations, or the train being unduly and substantially delayed. It is not practicable

255 in the interest of public safety and convenience to impose additional duties on the conductors than they now have, and if their attention was diverted more than it is now to other matters, it would increase chances of accident because of enforced inattention to their duties.

M. M. RICHEY.

Subscribed and sworn to before me this 29th day of June 1907.

[NOTARIAL SEAL.] J. M. LORICK
Notary Public.

My commission expires May 4th, 1908.

256 *Agreement of Counsel.*

Filed July 1st, 1907.

In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

It is agreed that, if the court should hold that it has jurisdiction of this cause, then it need not go into the question of the merits upon the hearing of this rule, but may thereupon grant the preliminary injunction referred to in the rule and refer the cause to a Master; provided that the sole purpose and effect of this stipulation is and shall be that the granting of such preliminary injunction and the referring of the cause to a Master without further affidavits or testimony on the merits on the part of the Complainants shall not be assigned or treated as error; all other rights and remedies whatsoever of the defendants shall remain unaffected, and particularly shall they not be considered as or regarded as having made any concession upon the question of the jurisdiction of this court or the conclusiveness as a matter of law of the action or order of the Virginia State Corporation Commission in the premises, all questions on the merits being reserved for a hearing before the Master and before the Court on final hearing—the concession made herein by the defendants as to the granting of the interlocutory injunction is not to be used against them on any question of fact, or legal presumption as to fact, either before the Master or before the Court on the final hearing on the merits.

257 *Memorandum of the Court.*

Filed July 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
BEVERLEY T. CRUMP and Others, Defendants.

I fully appreciate the fact that the questions involved in this controversy are serious in their character and require the closest scrutiny in order that a proper conclusion may be reached in determining the same.

It is always a source of regret to me to be called upon to determine the validity of an Act of a legislative or other body representing a sovereign State, and in this instance, it is especially so, entertaining as I do, the profoundest respect for the State of Virginia and her institutions. This is also true of North Carolina, where I have been recently called upon to decide questions similar to those involved in this proceeding, and applies with equal force to any of the States of the Union. However, I am called upon to *preform* a solemn duty and the obligation which rests upon me to determine the questions involved in this cause in accordance with the provisions of the Constitution of the United States is imperative. It is not my purpose to attribute any unworthy motives to those who framed the provisions of the constitution authorizing the creation of the Corpo-
258 ration Commission of Virginia. I am satisfied that those who were instrumental in securing the adoption of such provisions were honestly endeavoring to devise some means by which there could be a proper ascertainment of rates to be charged by railroads and other public corporations, yet in determining the questions presented for my consideration it becomes my duty to ascertain, if possible, the effect of the constitutional provisions in question. The courts cannot consider motives nor public policy in dealing with questions of this character, but must be guided solely in construing the same by the limitations imposed by the constitution of the United States. The power and duty of the courts of the United States to afford to individuals protection for their constitutional rights in respect to property even as against persons claiming under authority of the United States itself have repeatedly been recognized by the Supreme Court of the United States. A notable case being the one where the descendants of General Robert E. Lee instituted suit against officers of the United States for the possession of Arlington and the Circuit Court of the United States for the Eastern District of Virginia afforded relief to the constitutional rights of these descendants of General Lee for the possession of that property, and this decision of the Circuit Court was affirmed by the Supreme Court of the United States in the case of the United States *vs.* Lee 106 U. S.

196. The decision of the Circuit Court in this case is reported under the title of the Arlington case, 3rd Hughes 36.

The complainant in this cause seeks to enjoin the enforcement of certain passenger rates recently adopted by the State Corporation Commission of the State of Virginia. It insists that its present rates in the State of Virginia are not higher than a reasonable compensation for the services rendered by it to travellers on its lines, and are
259 in no sense excessive or exorbitant; that they are not unjustly, unduly unreasonable or illegally discriminatory between individuals, nor as between localities and that they in no way violate the law. It also insists that it has as an incident of its property, and as a property right, the right to charge for each service it renders a reasonable compensation, and that it is protected by the Fourteenth Amendment to the Constitution of the United States in making, receiving and collecting such charge. It is also insisted that the effect of the proposed rates would be to materially diminish its charges and reduce the same greatly below what would be reasonable and just compensation for the respective services rendered to the patrons of its lines. It is contended that to prevent it from charging a reasonable compensation for the services rendered to the travelling public would be to deprive it of its property without just compensation and without due process of law.

It is likewise insisted by the complainant that if the order of the State Corporation Commission of Virginia prescribing and fixing rates should be permitted to go into effect it would subject it to the danger of a multitude of suits based on such order and to prosecutions for penalties in enormous amounts.

Among other things complainant prays for an injunction against Beverley T. Crump, Henry C. Stuart, Joseph E. Willard, individually, and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of the State Corporation Commission during the pendency of this suit.

On May 8, 1907, an order was entered restraining the defendants from enforcing the provisions of the aforesaid Act, and at the same time, notice was issued to the defendants to appear before me on the
27th day of June 1907, and show cause why the injunction
260 should not be continued until the final hearing.

The defendants file an answer in which they say that the rates fixed by the State Corporation Commission are not confiscatory. However, when the motion came on for hearing counsel representing complainant and defendants signed an agreed statement of facts, as to that part of the bill which charges that the rates are confiscatory. The part of the agreement which is essential to the determination of the questions now before the court, reads as follows:

"It is agreed that, if the court should hold that it has jurisdiction of this cause, then it need not go into the question of the merits upon the hearing of this rule but may thereupon grant the preliminary injunction referred to in the rule and refer the cause to a master. * * *"

In view of the foregoing agreement the only question left for consideration is whether this court has jurisdiction of the questions involved.

It is insisted by counsel for the defendants that the State Corporation Commission of Virginia is a court within the meaning and intent of the provision of Section 720 of the Revised Statutes of the United States, which reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

I have heard with much pleasure the unusually able and interesting arguments of counsel representing complainant and defendants, and have given the questions presented much consideration, and in this connection, will say that, I have never had presented to me a question which has caused me greater concern than the one involved in this hearing.

Section 720 of the Revised Statutes is plain and explicit and cannot be misinterpreted, but I am forced to the conclusion that it does not apply in this instance.

261 It is true that the Court of Appeals of Virginia has held that the Corporation Commission of Virginia possesses judicial, executive and legislative functions. Nevertheless I am of opinion that in fixing the rates involved in this controversy the Corporation Commission was exercising a legislative function, and therefore was not acting as a court within the meaning of Sec. 720 of the Revised Statutes, and its acts in attempting to put in force the rates thus established are administrative. Under these circumstances, this court has jurisdiction to restrain the defendants from publishing and enforcing the rates which have heretofore been prescribed and established by said Commission. The acts sought to be restrained being purely ministerial in their character, the complainant seeks to assert a right which is guaranteed by the Constitution of the United States and it thereby becomes the duty of the court to entertain jurisdiction in order that the reasonableness of such rates may be judicially determined.

It is not necessary, at this time, to pass upon the validity of the provision of the Constitution of Virginia which created the State Corporation Commission; that is a question which the court reserves until the final hearing of this cause.

For the reasons herein stated the restraining order heretofore granted will be continued until the final hearing.

In conclusion, I will say that it is a source of gratification to me to know that my decision in respect to this question is not final, but that it is to be ultimately submitted to the Supreme Court of the United States for determination, and if I have committed error that distinguished tribunal will correct the same.

262 I will prepare an opinion at an early date in which I will discuss more fully my views in regard to the matters in controversy.

Decree Granting Interlocutory Injunction.

Entered and Filed July 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Before Honorable J. C. Pritchard, Judge of said Court.

In pursuance of the order to show cause made herein on the eighth day of May, 1907, by which the said defendants were ordered to appear before this Court in the United States Court Room at Asheville, North Carolina, at ten o'clock A. M., on Thursday, the twenty-seventh day of June, 1907, to show cause, if any they had or could show, why an injunction *pendente lite*, as prayed in the bill, should not be issued, said defendants appeared by counsel, and, by consent of defendants, through their counsel, and of the complainant, through its counsel, the fourth paragraph of the order herein of May 8, 1907, was amended so as to require the defendants, and each of them, to show cause before a judge of this court (instead of
263 before this court) in the United States Court Room at Asheville on the date mentioned; and thereupon the defendants filed their answer in writing objecting to the jurisdiction of the court in the premises; and, by like consent, Robert R. Prentis was substituted as one of the defendants in this cause, in the place of the defendant Beverley T. Crump, said Robert R. Prentis having, since the institution of this suit, succeeded the said Beverley T. Crump as a member, and as Chairman, of the State Corporation Commission); and it was stipulated, at the bar of this court, between counsel for the complainant and counsel for the defendants, as follows:

"It is agreed that, if the court should hold that it has jurisdiction of this cause, then it need not go into the question of the merits upon the hearing of this rule, but may thereupon grant the preliminary injunction referred to in the rule, and refer the cause to a Master; provided that the sole purpose and effect of this stipulation is, and shall be, that the granting of such preliminary injunction, and the referring of the cause to a Master, without further affidavits or testimony on the merits on the part of the complainants shall not be assigned or treated as error; all other rights and remedies whatsoever of the defendants shall remain unaffected, and particularly shall they not be considered as, or regarded as, having made any concession upon the question of the jurisdiction of this court or the conclusiveness as a matter of law of the action or order of the Virginia State Corporation Commission in the premises, all questions on the merits being reserved for a hearing before the Master and before the Court on final hearing—the concession made herein by the

defendants as to the granting of the interlocutory injunction is not to be used against them on any question of fact, or legal presumption as to fact, either before the Master or before the Court on the final hearing on the merits."

And thereupon the motion of the Complainant for an interlocutory injunction, as prayed in the said bill, coming on to be heard before the judge of this court, and the said motion having been heard upon the bill of complaint in this cause, treated as an affidavit, upon the answer thereto of the defendants objecting to the jurisdiction of the court, upon said stipulation of counsel, and upon the affidavits filed herein by the complainant, and the said motion having been argued by counsel, and having been fully considered, it is now ordered:

264 1. That, until the further order of the Court herein, the defendants Robert R. Prentis, Henry C. Stuart, and Joseph E. Willard, constituting the State Corporation Commission of Virginia, and each and all of their successors in office, their and each of their servants, agents and employees, be, and they hereby are, restrained and enjoined from publishing, or having published, in any newspaper published in the City of Richmond, Virginia, the general order of the State Corporation Commission bearing date the twenty seventh day of April, 1907, in respect to passenger rates, in the bill in this cause mentioned, and from taking any other step or steps whatsoever under the Constitution or laws of Virginia, or otherwise, to enforce the requirements of said order.

2. That, until the further order of the Court herein, the defendant R. T. Wilson, Clerk of the State Corporation Commission, his successors in office, and his servants, agents and employees be, and they hereby are, restrained and enjoined from publishing, or having published, the said order of the State Corporation Commission in any newspaper published in the City of Richmond, Virginia.

3. That, until the further order of the Court herein, the owners, proprietors, or managers of any newspapers published in the City of Richmond, Virginia, be, and each and every one of them is, hereby restrained and enjoined from publishing, or having published, under the direction of the State Corporation Commission, or of the Clerk thereof, such order of the State Corporation Commission of Virginia.

4. That said Complainant, or some one for it, shall, before a judge of this Court, or the Clerk thereof, execute a bond in the penalty of Two hundred thousand dollars with Surety to be approved by such Judge, or by such Clerk, conditioned to pay into the registry of this court, from time to time, when and as the Court may so order,

265 such sums or sums of money as shall be equal to the difference between the aggregate passenger rates charged and received by it for intrastate services on its lines in the State of Virginia, and what would have been the aggregate amount for such services, at the rates fixed in said order of the State Corporation Commission of Virginia of the twenty-seventh day of April, 1907, and further conditioned, that, whereas an interlocutory injunction has been issued in the above entitled cause, by the terms of which the defendants, and each of them, are restrained until the further order of the Court, as from said order will appear, now, should such interlocutory injunction be

dissolved or vacated as having been wrongfully issued, or because said acts were improperly restrained, then that the complainant shall pay, or cause to be paid, all damages caused by the issue of such interlocutory injunction, and the costs of this cause in connection therewith.

5. That the complainant shall give to any person purchasing a ticket for intrastate travel on its lines in the State of Virginia, and to any person purchasing a mileage book for travel on its lines in the State of Virginia, and not good outside of the said State, a transferable coupon, or other written or printed evidence, representing the sum which such person, or his transferee, will, upon the final decision of this cause upholding the validity of said order of April 27, 1907, in respect to passenger rates, be entitled to receive, out of the cash deposit to be made in the registry of this Court, in pursuance of the obligation of the bond hereinbefore mentioned. The form of said coupon, or of other written or printed evidence, shall be substantially as follows:

"Southern Railway Company.

"*Virginia Ticket Claim Coupon.*

"To be Retained by Passenger. Not Good for Passage.

266 "Issued under an order of the Circuit Court of the United States for the Eastern District of Virginia in a suit therein pending between Southern Railway Company, Complainant, and Beverley T. Crump, *et als.*, Defendants.

Southern Railway Company has, on the date stamped hereon received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated in such ticket within the State of Virginia to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by the order of the Corporation Commission of Virginia of April 27th, 1907, and is payable only on the order and out of the registry of said court, upon surrender to the court of this coupon, and upon such conditions, if any, as said court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

"In case the ticket with which this coupon corresponds is presented for redemption, it must be presented at General Passenger Agent's office, Washington, D. C., accompanied by this coupon either for surrender or for appropriate notation."

But nothing herein contained shall be construed as requiring the complainant to issue any such coupon, or any such other written or printed evidence, in connection with the sale of any mileage book, or any ticket, good for any interstate passage, or for passage in another state, or in other states.

6. That the complainant shall preserve to be produced, whenever so ordered by the Court herein, all canceled tickets in respect to which such coupons or other written or printed evidence may have

been issued, and may be outstanding, and shall, from time to time, report to the Court, at intervals to be fixed by an order of the Court herein, statements showing the revenue by it charged and collected for its services in the intrastate transportation of passengers in Virginia, in excess of the amount permitted by the said order of April 27, 1907, and the complainant shall, from time to time, give such further bond or bonds as the Court may require, to secure the proper payment into the registry of the Court of all the amounts
267 which finally it shall be adjudged that it should pay under the final decision of this cause.

7. If it shall be determined herein that the Complainant is entitled to the amount covered by said bond or bonds, then said bond or bonds shall be released and canceled by the Court, and, if any amount shall have then been paid into the registry of the Court pursuant thereto, then upon such determination in favor of the complainant, the sum or sums so paid into the registry shall be repaid to the complainant without further order of the Court herein.

8. It is further ordered that a writ of injunction shall forthwith issue in accordance with this order.

9. And thereupon the complainant tendered its bond to comply with the provisions in respect to a bond in this order, duly executed by the complainant as principal, and by the United States Fidelity & Guaranty Company as Surety, which said bond, and the execution thereof, and the surety thereto, are hereby approved.

J. C. PRITCHARD,
U. S. Circuit Judge.

July 10th, 1907.

268 *Injunction Bond.*

Filed July 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Know all men by these presents that Southern Railway Company, a corporation of the State of Virginia, the principal office of which is in the City of Richmond in said State, as Principal, and The United States Fidelity & Guaranty Company, as Surety, are held and firmly bound unto the United States of America, in the just and full sum of Two Hundred Thousand dollars, for the payment of which well and truly to be made, we do hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents.

Sealed with our seals and dated this 10th day of July in the year 1907.

The condition of the above obligation is such, that

Whereas an interlocutory decree has been made in the above entitled cause, by the terms of which Southern Railway Company,

Complainant in the said cause, Principal, is ordered to execute a bond conditioned to pay into the registry of this court, from time to time, when and as the said court may so order, such sum or sums of money as shall be equal to the difference between the aggregate passenger rates charged and received by it for intrastate service on its lines in the State of Virginia, and what would have been
269 the aggregate amount for such services at the rates fixed in the general order of the State Corporation Commission of Virginia, bearing date the twenty seventh day of April, 1907, and

Whereas it is ordered that the said Southern Railway Company, Principal, shall preserve to be produced whenever so ordered by the court herein, all cancelled passenger tickets in connection with which coupons or other written or printed evidence may have been issued, as required by the said decree, and may be outstanding, and shall, from time to time, report to the court, at intervals to be fixed by the order of the court herein, statements showing the revenue by it charged and collected for its services in the Virginia intrastate transportation of passengers in excess of the amounts permitted by the said general order of the Virginia State Corporation Commission, and

Whereas it is ordered that from time to time the said Southern Railway Company, principal, shall give such further bond or bonds as the court may require to secure the proper payment into the registry of the court of all amounts which finally it shall be adjudged that it should pay, under the final decision in this cause,

Now, therefore, if the above named Southern Railway Company, Principal, shall well and truly comply with each and every one of the above requirements of the interlocutory decree above mentioned, and such other decree or decrees as this court may enter in this cause, and if the said Southern Railway Company, Principal, shall pay, or cause to be paid, all damages caused by the issue of said interlocutory injunction, and the costs of this cause in connection therewith, in the event that the said interlocutory injunction shall be dissolved, or vacated, as having been wrongfully issued, or because the said acts were improperly restrained, then the foregoing
270 obligation to be null and void, otherwise to be and remain in full force and effect.

In testimony whereof the parties hereto have caused these presents to be duly signed in their respective names and their respective seals to be hereunto affixed this 10th day of July in the year 1907.

[Seal of Southern Railway Company.]

SOUTHERN RAILWAY COMPANY,
By A. B. ANDREWS, *First Vice President.*

Attest:
GEO. R. ANDERSON,
Asst. Sec'y.

[Seal of the United States Fidelity & Guaranty Company.]

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By E. LESLIE SPENCE, JR., *Att'y in Fact.*

271 *Interlocutory Injunction.*

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

The President of the United States of America to Robert R. Prentis, Henry C. Stuart, Joseph E. Willard, and R. T. Wilson; and to their agents, servants and employees and successors in office, and each and every of them; and to the owners, proprietors and managers of all newspapers published in the City of Richmond, Virginia, and each of them, Greeting:

Whereas the Honorable Judge of the Circuit Court of the United States for the Eastern District of Virginia, has, on the tenth day of July, 1907, after due notice and hearing, ordered that an injunction issue as herein stated, therefore:

1. Until the further order of the Court herein, the defendants, Robert R. Prentis, Henry C. Stuart, and Joseph E. Willard, constituting the State Corporation Commission of Virginia, and each and all of their successors in office, their and each of their servants, agents and employees are, and each of them is, hereby restrained and enjoined from publishing, or having published, in any newspaper
272 published in the City of Richmond, Virginia, the general order of the State Corporation Commission bearing date the twenty seventh day of April, 1907, in respect to passenger rates, in the bill in this cause mentioned, and from taking any other step or steps whatsoever, under the Constitution or laws of Virginia, or otherwise, to enforce the requirements of said order.

2. Until the further order of the Court herein the defendant R. T. Wilson, Clerk of the State Corporation Commission, his successors in office, and his servants, agents and employees are, and each of them is, hereby restrained and enjoined from publishing, or having published, the said order of the State Corporation Commission in any newspaper published in the city of Richmond, Virginia.

3. Until the further order of the Court herein the owners, proprietors or managers of any newspaper published in the City of Richmond, Virginia, are, and each and every of them is, hereby restrained and enjoined from publishing, or having published, under the direction of the State Corporation Commission, or of the Clerk thereof, such order of the State Corporation Commission of Virginia.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of Richmond, Virginia, in said District, this tenth day of July, A. D., 1907.

[Seal of United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

273 *Marshal's Return.*

Executed July 11th, 1907, by delivering in person to Robert R. Prentis, Joseph E. Willard and R. T. Wilson at the office of the State Corporation Commission of Virginia at Richmond, Va., each a true copy of the within order, and further executed July 11th, 1907, by delivering in person to J. St. George Bryan at the office of the Richmond Times Dispatch in the City of Richmond, Va., a true copy of the within order, the said J. St. George Bryan being the Secretary and Treasurer of the said Richmond Times Dispatch Company, the President of said Company not being found, and to Alfred B. Williams in person at the office of the News Leader in Richmond, Va., he being the President of the said News Leader Company, and to Charles B. Cooke in person at the office of the Evening Journal in Richmond, Va., he being the President of the said Evening Journal, each a true copy of the within order, and further executed July 13th, 1907, by delivering in person to Henry C. Stuart at the office of the State Corporation Commission of Virginia in Richmond, Va., a true copy of the within order.

MORGAN TREAT,
United States Marshal.

274 *Demurrer of Robert R. Prentis to Bill of Complaint.*

Filed August Rules, Monday, August 5th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

The demurrer of Robert R. Prentis, one of the defendants to the above styled suit, to the bill of complaint of the above named complainant.

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows:

First. That the said plaintiff has not, in and by the said bill, made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for;

Second. That this defendant has no personal or individual
275 interest in the matters and things referred to in said bill;

Third. That the said plaintiff has an adequate remedy at law;

Fourth. That the matters and things complained of in said bill are *res adjudicata;*

Fifth. That this court has no jurisdiction to hear and determine this cause, for the reason that this is a suit against the State of Virginia;

Sixth. That this court has no jurisdiction to hear and determine this cause, for the reason that the State Corporation Commission is a "court" of the State of Virginia, and this court is therefore without power to enjoin the said Commission;

Seventh. That this court has no jurisdiction to hear and determine this cause, for the reason that, if said Commission is not such a "court" as this court is without power to enjoin, then the publication of said Commission's order of April 27th, 1907, was a necessary part of the enactment of the same as legislation, and this court is equally without power to enjoin legislation before it is enacted.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto, and humbly demands the judgment of this court whether he shall be compelled to
276 make any further answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

WILLIAM A. ANDERSON,
A. CAPERTON BRAXTON,
JNO. W. DANIEL.
Counsel for said Defendants.

We hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law.

WILLIAM A. ANDERSON,
A. CAPERTON BRAXTON,
JNO. W. DANIEL.
Counsel for said Defendants.

STATE OF VIRGINIA, *City of Richmond, To-wit :*

Robert R. Prentis, being first duly sworn, deposes and says, that he is the defendant named in the foregoing demurrer; that said demurrer is not interposed for delay, and that the same is true in point of fact.

ROBERT R. PRENTIS.

Subscribed and sworn to before me this 3rd day of August, 1907.

JNO. S. EGGLESTON,
Notary Public for the City of Richmond, in the State of Virginia.

277 *Joint and Separate Plea of H. C. Stuart, Joseph E. Willard, and R. T. Wilson to Bill of Complaint.*

Filed August Rules, Monday, August 5th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

The joint and separate plea of H. C. Stuart, Joseph E. Willard, and R. T. Wilson, three of the defendants to the above styled suit, to the bill of complaint of the above named complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, for plea to the whole of said bill, say that they have no personal, private, or individual connection with the subject matter of this suit, but are only interested therein, or connected therewith in so far as the said Stuart and Willard are two of the three members of the State Corporation Commission of Virginia and said Wilson is Clerk thereof; that the said State Corporation Commission was created and established, and its functions, powers, duties, and
278 procedure prescribed and provided for, by the Constitution and statutes of said State (of which this court will take judicial notice) as will fully appear from "Defendants' Exhibit A," "Defendants' Exhibit B," "Defendants' Exhibit No. 1," and "Defendants' Exhibit No. 2," all of which said exhibits are filed with, and made a part of the Answer of the defendants herein to the Rule heretofore awarded in this cause, requiring said defendants to appear before the Honorable Jeter C. Pritchard, one of the Judges of this Court, at the City of Asheville, in the State of North Carolina, on the 27th day of June, 1907, and show cause why an injunction *pendente lite* should not issue, as prayed for in said bill of complaint, and which said exhibits are hereby referred to, and made a part of this plea as fully as if the same were herein set forth *in extenso*, and are prayed to be taken and read as a part of this plea; that the said constitutional and statutory provisions are still in full force and effect, and have been in full force and effect continuously since prior to the 1st day of January, 1904, and they represent the entire constitutional and statutory provisions of said State upon the subject of this plea or relating to the subject-matter of this suit, in effect at any time since the 1st day of January, 1904; that, on the 6th day of October 1903, certain Rules of Order, Practice and Procedure before the said State Corporation Commission were duly made and prescribed by said Commission and entered upon the records of its proceedings, and also printed and distributed, all of which was au-

thorized by the aforesaid statutes, and was in accordance with the authority and provisions of said statutes; which said Rules of Order, Practice and Procedure are filed as "Defendants' Exhibit
279 No. 3" with, and made a part of, the aforesaid Answer of the defendants herein to the aforesaid Rule to show cause why an injunction *pendente lite* should not be awarded in this suit, as prayed for in said bill of complaint, and which said Exhibit is hereby referred to, and made a part of this plea as fully as if the same was herein set forth *in extenso*, and is prayed to be taken and read as a part of this plea; that the proceedings before the said State Corporation Commission, which are referred to in said bill of complaint, and in which the said Commission, on the 27th day of April, 1907, entered its order in respect to the passenger rates of the plaintiff, complained of in said bill of complaint, were taken and had before the said Commission in strict conformity, in every respect, with the provisions, hereinbefore referred to, of the Constitution and statutes of the said State, and of the said Rules of Order, Practice and Procedure, all of which will more fully and at large appear from sections *"Fifth"* and *"Eighth"* of the aforesaid Answer of the defendants herein to the aforesaid Rule to show cause why an injunction *pendente lite* should not be awarded in this suit, as prayed for in said bill of complaint, and from "Defendants' Exhibit No. 4" and "Defendants' Exhibit No. 5," which said Exhibits are filed with and made a part of the said Answer of the defendants herein to the aforesaid Rule, and which said Exhibits, and sections *"Fifth"* and *"Eighth"* of the said Answer to said Rule, (except in so far as said sections present any defense other than the sole defense interposed by and relied upon in this plea, viz: that this suit cannot be entertained by this court because of the inhibition of Sec. 720 of the Revised Statutes of the United States, hereinafter more particularly referred to,) are hereby referred to, and made
280 a part of this plea as fully as if the same were herein set forth *in extenso*, and are prayed to be taken and read as a part of this Plea; that the Commonwealth of Virginia was a formal plaintiff in the aforesaid proceedings before said Commission, referred to in said bill of complaint, and was required to be such, by the aforesaid laws of said State; that, under said laws, the said Commonwealth, as well as any defendant in said proceedings, may, as a matter of right, now appeal from said order of said Commission, of April 27th, 1907, to the Supreme Court of Appeals of Virginia; that, for the reasons next hereinafter pointed out, this honorable court is without power to enjoin the said Supreme Court of Appeals from hearing and deciding any such appeal, should the same be taken; that, by a certain Act of the Congress of the United States, which is printed and published as Section 720 of the Revised Statutes of the United States, it is provided that, "a writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy"; that no injunction is, or ever has been, authorized to be granted in this suit "by any law relating to proceedings in bankruptcy"; that, as

will appear from the aforesaid constitutional and statutory provisions of the said State, and also from the decisions and opinions of the Supreme Court of Appeals of said State, which is the highest court of, and the court of last resort in, the said State, of which said opinions and decisions, as well as of which said constitutional and statutory provisions, this court will take judicial notice, the

281 said State Corporation Commission of Virginia is a "court" of the said State, within the true meaning, purport, intent, and purview of the aforesaid Act of Congress, and was acting as such "court" continuously from the inception of the aforesaid proceedings before it, referred to in said bill of complaint, up to and including the entry of its aforesaid order of April 27th, 1907, relating to the passenger rates of the plaintiff, and was also so acting in publishing said order, in accordance with the aforesaid laws of the said State, and was also so acting at the time this suit was instituted, and at the time the restraining order was granted in this suit, and will and must so act in any and all steps which it may hereafter take in respect to matters and things referred to in said bill of complaint; and these defendants say that this honorable court is without power to grant any of the relief prayed for in the said bill of complaint, or to entertain this suit, because no relief can be granted the plaintiff herein without enjoining said State Corporation Commission, which this court is forbidden to do by the aforesaid Act of Congress; all of which matters and things these defendants aver to be true, and they plead the same to the whole of the said plaintiff's bill, as aforesaid, and pray the judgment of this honorable court whether they ought to be required to make any other or further answer to the said bill, and pray to be hence dismissed, with their costs and charges in that behalf most wrongfully sustained.

JNO. W. DANIEL,
WILLIAM A. ANDERSON,
A. C. BRAXTON,
Counsel for said Defendants.

282 We hereby certify that, in our opinion, the foregoing plea is well founded in point of law.

JNO. W. DANIEL,
WILLIAM A. ANDERSON,
A. C. BRAXTON,
Counsel for Defendants.

STATE OF VIRGINIA, *City of Richmond, To wit:*

H. C. Stuart, being duly sworn, deposes and says that he is one of the defendants named in the foregoing plea, and that the said plea is true in point of fact, and is not interposed for delay.

H. C. STUART.

Subscribed and sworn to before me, this 5th day of August, 1907.

JNO. S. EGGLESTON,
Notary Public for the City of Richmond,
In the State of Virginia.

Petition for Modification of Interlocutory Injunction.

Filed August 29th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

283 To the Honorable Judges of the United States Circuit Court for the Eastern District of Virginia:

Complainant, the Southern Railway Company, respectfully represents:

1. That, heretofore, it has filed before the Honorable Judges of the Circuit Court of the United States for the Eastern District of Virginia, its bill in equity against Beverley T. Crump, Henry C. Stuart and Joseph E. Willard, members of the State Corporation Commission of Virginia, and Richard T. Wilson, Clerk of the said Commission, in which bill it was prayed, for reasons therein fully and at large set forth, that a certain order, entered by the State Corporation Commission of Virginia on the 27th day of April, 1907, whereby a two cent per mile maximum intrastate passenger rate was imposed upon the complainant as the maximum charge it could make for carrying passengers upon its railroad in the State of Virginia, should be declared unreasonable, inoperative and void.

2. Complainant further says that, in response to the prayer of the said bill, the Honorable J. C. Pritchard, one of the judges of this Honorable Court, on the 8th day of May, 1907, entered a restraining order, restraining the said defendants, Beverley T. Crump, Henry Stuart and Joseph E. Willard, constituting the State Corporation Commission of Virginia, and each and all of their successors in office, their and each of their servants, agents and employees, from publishing or having published in any newspaper published in the city of Richmond, the said order, dated April 27, 1907, in respect to passenger rates, and from taking any other step or steps under the Constitution or laws of Virginia to enforce the requirements
284 of the said order, and restraining the defendant, R. T. Wilson, Clerk of the State Corporation Commission, and his successors in office, and his agents, servants and employees, from publishing or having published the said order of the State Corporation Commission in any newspaper in said city of Richmond. And at the same time the said Honorable J. C. Pritchard caused a rule to be issued against said defendants to show cause, if any they could show, why said restraining order should not be continued and an injunction, *pendente lite*, granted in accordance with the prayer of this complainant, which said rule was made returnable at the city of Asheville, N. C., on the 27th day of June, 1907.

3. Complainant further shows that, thereafter, on the said 27th day of June, 1907, the defendants appeared at the city of Asheville, N. C., in response to said rule, and filed their answer to the same, in which said answer the defendants maintained, upon the various grounds therein set up, that this Court was without jurisdiction to enter any order in the premises, save an order dismissing the said proceedings for want of jurisdiction.

4. Complainant, however, says that, after full argument of and concerning all the matters of jurisdiction set forth in said answer, the Honorable J. C. Pritchard decided that the United States Circuit Court for the Eastern District of Virginia did have, and of right should maintain, jurisdiction of and concerning the matters and things complained of in said bill; and, in pursuance of said judgment and conclusion, an order was entered by him on the 10th day of July, 1907, granting to complainant an injunction,
285 *pendente lite*, against the doing of the things complained of in said bill.

5. Complainant further says that, since said injunction, *pendente lite*, has been granted by this Honorable Court, the Governor and other representatives of the State of Virginia have approached this complainant with a view to an arrangement pending the final determination of the issues set up in said bill whereby this complainant shall put into effect a two cent passenger rate in conducting its intrastate Virginia passenger business, the same to remain in effect until said issues have been finally determined; and under the circumstances this complainant has, subject to the consent of this Honorable Court, consented to put such rates into effect as to intrastate passenger travel in the State of Virginia pending the determination of the issues in this cause, as is evidenced by the following letters which have been exchanged between the Honorable Claude A. Swanson, the Governor of Virginia, and this complainant and other railway companies which have suits pending in this Court similar in character to the one instituted by complainant:

"COMMONWEALTH OF VIRGINIA, GOVERNOR'S OFFICE,
RICHMOND, *August* 3, 1907.

Hon. Alexander Hamilton, Counsel for Atlantic Coast Line Railroad Company; Hon. Henry T. Wickham, Counsel for the Chesapeake and Ohio Railway Company; Messrs. Joseph I. Doran and Lucien H. Cocke, Counsel for Norfolk & Western Railway Company; Hon. Alfred P. Thom, Counsel for Southern Railway Company.

MY DEAR SIRS: As Governor of Virginia, and as such interested in all that appertains to the best interests of the State, I have been very much concerned in the pending suits and controversies affecting the establishment of passenger rates in the State of Virginia. The welfare of all would, in my opinion, be subserved by a satisfactory and amicable arrangement pending the litigation.

I realize that the material interests of Virginia and the wellbeing of her people are largely dependent upon the development and efficiency of her transportation lines.

The railroad companies and their interests are entitled to the same rights and the same consideration that other persons and their property are entitled to; no more and no less. The people of
286 Virginia, as I am confident, concur with me in thinking that these companies are entitled to be given no special privileges and that they should not be subjected to any unjust burdens and discriminations.

Feeling this, and as Governor of Virginia interested in all of her varied interests, it is my earnest hope that this controversy may reach such a prompt and satisfactory solution as will be beneficial to all parties.

I have cordially co-operated with the Corporation Commission and their counsel in this matter, and am frank to say am in thorough accord with the Commission with respect to their authority and their action in the rate cases.

With the approval of the Corporation Commission I tender the following proposal for your consideration, and regard it as a fair arrangement pending the final adjudication of the controversy by the Supreme Court of the United States:

1. The passenger rates, rules and regulations with respect thereto, ordered by the Corporation Commission on April 27th, 1907, shall be put into operation not later than the first of October, 1907, and continued until the pending causes are finally adjudicated by the Supreme Court of the United States, both as to jurisdiction, and merits.

2. That the cases in the Circuit Court of the United States shall be hastened for decision in the Supreme Court of the United States as speedily as possible.

3. That the evidence that has already been introduced in the cases before the Corporation Commission shall be used as the evidence of the litigation in the Circuit Court of the United States if and when heard on its merits, each party having the right to supplement it with additional evidence as to facts subsequently arising.

4. That counsel representing the State and counsel representing the railroads shall agree upon a method of procedure and proper details necessary to carry these suggestions into effect, and to more accurately and carefully define and protect the rights of the parties.

I feel sure the acceptance of these suggestions would be regarded by the people of Virginia as an evidence of a disposition on the part of the railroads to have a speedy determination of this question, and to respect the wishes and judgment of the people of Virginia, and her constituted authorities in this matter.

Very respectfully yours,

(Signed) CLAUDE A. SWANSON, *Governor.*"

"RICHMOND, VA., *August 3rd*, 1907.

To the Honorable Claude A. Swanson, Governor of Virginia.

DEAR SIR: We beg to acknowledge your letter of this date bearing upon a proposed adjustment, *pendente lite*, of the controversy over the passenger rates adopted by the State Corporation Commission of Virginia.

The spirit of your letter is appreciated by us and in a
287 similar spirit we accept your suggestions, subject, however, as to your first suggestion, to the necessity for us first to obtain the approval of the Circuit Court of the United States for the Eastern District of Virginia to a modification of the interlocutory injunction awarded by it in our several cases. We will, however, make early application for such modification and, as these injunctions were granted on our motion, we anticipate no difficulty in having the rates in effect by the first of October as mentioned by you.

We note and have acted upon what you say in respect to an arrangement as to the method of procedure and as to the details of carrying this adjustment into effect.

Yours respectfully,

ALEXANDER HAMILTON.
H. T. WICKHAM.
(Signed) JOS. I. DORAN.
LUCIEN H. COCKE.
By JOS. I. DORAN.
ALFRED P. THOM."

And now, Complainant, in pursuance of the understanding reached at said conference as evidenced by the letters hereinabove set forth, prays this Honorable Court that an order may be entered whereby Complainant may be authorized to put into effect on the 1st day of October, 1907, in its intrastate passenger service in the State of Virginia, a maximum passenger rate of two cents per mile, the same to remain in effect pending the suit in which this petition is filed and until all of the issues set up in these proceedings shall have been finally passed upon by the Supreme Court of the United States, or shall, in some other way, have been finally disposed of.

SOUTHERN RAILWAY COMPANY,
Complainant,

By J. M. CULP, *Vice President.*

ALFRED P. THOM,
Counsel.

288 *Decree Modifying Interlocutory Injunction.*

Entered and Filed August 29th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

This cause came on this the 29th day of Aug., 1907, to be heard upon the bill of complaint of the complainant with the exhibits therewith filed, upon the restraining order heretofore granted in

response to the prayer of said bill, upon the injunction *pendente lite* heretofore granted on the 10th day of July, 1907, and upon the petition of the complainant, which is, by leave of the Court, this day filed.

And it appearing to the Court upon the reading of said petition and for the reasons therein set forth that said complainant has prayed for a modification of said interlocutory injunction so as to permit it to put into effect in the State of Virginia for its intrastate passenger business a maximum rate of 2 cents per mile, which rate shall be effective on the 1st day of October, 1907, and shall continue in effect until the matters at issue in this cause shall be finally disposed of by the decision of the Supreme Court of the United States or otherwise finally determined.

Now this Court, having considered the entire record, includ-
289 ing said petition this day filed, doth adjudge, order and decree that the prayer of the said petition be and the same is hereby granted and to this end the injunction *pendente lite* heretofore granted in this cause on the 10th day of July, 1907, be and the same is now amended and modified to the end that authority is hereby given to the complainant to put into effect on the 1st day of October, 1907, a maximum passenger rate for its intrastate passenger business in the State of Virginia of 2 cents per mile, the same to obtain and be in effect until the issues in this cause shall have been finally passed upon and determined by the Supreme Court of the United States or otherwise finally disposed of and ended.

And by consent of all parties to this suit it is further adjudged, ordered and decreed that, in so putting into effect the said maximum passenger rate where, in the putting in of such rate, either the whole number of miles or mixed number with fractions does not result in a multiple of 5 the said complainant shall add or deduct a sufficient sum to make the amount of the fare the nearest multiple of 5; and also that in applying the said passenger rate the said complainant may charge and collect a minimum sum of 10 cents per passenger for any single haul and said complainant may charge and collect in addition to regular ticket rates the fixed sum of 10 cents from all cash fare passengers who had been afforded reasonable opportunity for purchasing tickets before boarding the train, provided that the conductor shall in all such cases deliver to such passengers a receipt for the excess collected and said complainant shall redeem said receipt if presented to any of its ticket offices within thirty days from the date of its issue;

290 And by like consent it is further adjudged, ordered and decreed that the complainant shall carry free for said passengers paying the rate of fare as herein provided the same amount of baggage as it has been heretofore accustomed to do under its rules and regulations and for excess baggage it shall make the same charges that it has been accustomed to make without increasing the same or changing the regulations in connection therewith unless authorized by a further order of this Court.

This order is entered without prejudice to any of the rights of the complainant to any relief prayed in this cause, and only for the purpose of permitting it to put into effect and to observe, *pendente lite*,

the rates hereinbefore mentioned, and is without prejudice to the jurisdiction of this court in this cause.

J. C. PRITCHARD,
United States Circuit Judge.

Aug. 29th, 1907.

Setting Down Demurrer of R. R. Prentis to be Argued.

Filed September Rules, Monday, September 2nd, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Now comes the Complainant, the Southern Railway Company, by its counsel in the above entitled cause and sets down the demurrer filed by Robert R. Prentis, one of the defendants herein, to be argued.

ALFRED P. THOM,
Counsel for Complainant.

291 *Setting Down Joint and Separate Plea of Henry C. Stuart, Joseph E. Willard and R. T. Wilson to be Argued.*

Filed September Rules, Monday, September 2nd, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Now comes the Complainant, the Southern Railway Company, by its counsel in the above entitled cause, and sets down the joint and separate plea filed by Henry C. Stuart, Joseph E. Willard and R. T. Wis*l*on, defendants herein, to be argued, on the ground that the said plea does not furnish any sufficient defense to the bill of complaint herein filed.

ALFRED P. THOM,
Counsel for Complainant.

292 *Order Filing Plea of Res Adjudicata.*

Entered and Filed September 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

The Defendants by Counsel tendered to the Court a plea of *res adjudicata* to the Complainant's bill in this cause, and moved the Court to grant them leave to file said plea, whereupon it is ordered that said leave be given and the plea is accordingly filed.

And it is further ordered that leave be, and the same is hereby granted to the Complainant in this cause to set down the said plea to be argued, or take issue on said plea on or before the first day of the October Term 1907 of this Court.

J. C. PRITCHARD,
United States Circuit Judge.

September 10th, 1907.

293 *Plea of Res Adjudicata.*

Filed September 10th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump), H. C. STUART and JOSEPH E. WILLARD, Individually and as Constituting the State Corporation Commission of Virginia, and R. T. WILSON, Clerk of said Commission, Defendants.

The Joint and Several Plea of the Above Named Defendants to the Bill of Complaint of the Above Named Complainant.

These defendants respectively by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill to be true in such manner and form as the same are therein set forth and alleged, for further plea to the whole of said bill, say as follows:

That at a lawful session of the Virginia State Corporation Commission held on the 27th day of April, 1907, in the rooms of said Commission in the State Capitol in the City of Richmond, Virginia, said Commission entered up the final order and judgment and made

its final findings in the case then pending before said Commission known as The Virginia Passenger Rate Case, in which case the Commonwealth of Virginia was the plaintiff, and the said complainant here, and others were the defendants, which order and judgment and findings of said Commission were made pursuant to a certain notice to the complainant here, and the other steam railway companies operating lines of steam railway in the State of
294 Virginia, the defendants in said Passenger Rate Case, which notice, proceedings, and findings are set forth *in extenso* in Defendants' Exhibit No. 5, exhibited as a part of the Answer of these defendants, to the Rule heretofore awarded in this cause requiring these defendants and each of them to show cause before this Court or the Judge thereof in the United States Court Room at Asheville, North Carolina, at 10 o'clock on the 27th day of June, 1907, why an injunction *pendente lite* as prayed for in the said Bill should not be issued, to which exhibit now a part of the record in this cause, special reference is here made.

And these defendants aver that the said the State Corporation Commission of the State of Virginia which entered said order and judgment, and made said findings as set forth in said Exhibit No. 5, filed as part of said Answer, was at and before the said 27th of April, 1907, and has continued from said last mentioned date to be, and still is, and continues to be, a tribunal validly created and constituted under the Constitution and laws of said Commonwealth, and thereby duly invested and clothed with exclusive original jurisdiction and power in the matter of regulating and prescribing the charges which shall be made by the complainant and all other companies or corporations owning or operating railways in said State, for the transportation of passengers between points wholly within the territorial limits of Virginia, upon the lines of railway so owned or operated by any such company; and said Commission was, and is, and continues to be, at the date of, before, and since the said 27th of April, 1907, fully empowered by said Constitution and laws to control and regulate all such companies in respect to their duties to the public within the Commonwealth of Virginia, under and by virtue of the statutes, and sections of the Constitution of Virginia heretofore filed as part of the said Answer to said Rule as
295 Defendants' Exhibit No. 1, Defendants' Exhibit No. 2, and already made a part of the record in this cause.

And these defendants say further that the said State Corporation Commission, as it was required by law that it should do, accorded to the complainant here, one of the defendants in said Passenger Rate Case, a full and complete hearing, all proper judicial process, and all due process of law, and every opportunity to make every defense, and to assert every right which said complainant might desire, or be advised to assert in said case against the proposed reduction of the rates and fares theretofore charged by the complainant for the transportation of passengers on its lines within the State of Virginia.

And these defendants further say that the complainant here was duly made a party defendant in and to said Passenger Rate Case, appeared before said tribunal therein upon the hearing and trial

thereof by counsel, filed its Answer therein, introduced all of the testimony which it desired, or was advised to be necessary or proper for making its defense therein, both of witnesses heard and examined orally before said Commission, and of documentary and other written testimony filed before said Commission as part of the case of the said defendant, who is now the complainant here.

And these defendants further say that said tribunal (then consisting of Beverley T. Crump, said H. C. Stuart, and Joseph E. Willard), as it was its duty to do, proceeded and acted in all respects judicially in the hearing of said case, and in all of the proceedings had in connection therewith, and judicially investigated and considered all the questions and matters passed upon by said Commission in said case, or which were pertinent to the questions and matters presented therein, and in making its findings, and entering its order, and judgments aforesaid, as will appear from the

296 Exhibits filed as part of their aforesaid Answer to said Rule.

And these defendants further say that the same identical matters, and every matter, and every question which is presented or raised by the Bill of Complaint here, and every ground of complaint or of defense against the proposed action of said Commission, which the complainant seeks to assert here against the justness and reasonableness or the legality of the rates adjudicated, fixed, and prescribed in said case by said State tribunal for the transportation of passengers by the complainant upon its lines in Virginia, was presented, involved, raised, heard, tried, and passed upon, adjudicated, and finally decided by said State Corporation Commission of Virginia in due and legal manner and form in said Virginia Passenger Rate Case, in which the said Commonwealth was the plaintiff, and the complainant here was a defendant, and that said State Corporation Commission thereupon rendered and entered up its aforesaid final decision, order, and judgment upon the merits, upon the very same identical matters now sued upon in this cause.

Wherefore these defendants now here specially plead and rely upon said former judgment, in bar to the said plaintiff's present Bill, and humbly demand the judgment of this Honorable Court whether they shall be required to make any further defense thereto, and respectfully pray to be hence dismissed with their costs and charges in this behalf sustained.

WILLIAM A. ANDERSON,
JNO. W. DANIEL,
A. CAPERTON BRAXTON,
Of Counsel for Defendants.

297 I hereby certify that in my opinion the foregoing plea is well founded in law.

WILLIAM A. ANDERSON,
Of Counsel for Defendants.

STATE OF VIRGINIA, *City of Richmond, To-wit:*

R. T. Wilson, being duly sworn deposes and says that he is one of the above named defendants, and that the foregoing plea is true in point of fact, and is not interposed for delay.

R. T. WILSON.

Subscribed and sworn to before me in my City aforesaid this the 10th day of September, 1903.

T. GRAY HADDON,
Notary Public in and for Richmond City.

298 *Setting Down Plea of Res Adjudicata to be Argued.*

Filed October Rules, Monday, October 7th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Now comes Complainant, Southern Railway Company by its counsel in the above entitled cause and sets down the joint and several plea of *Res Adjudicata* of the above named defendants herein to be argued, on the ground that the said plea does not furnish any sufficient defense to the Bill of Complaint herein filed.

ALFRED P. THOM,
Counsel for Complainant.

299 *Final Decree.*

Entered and Filed December 26th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

This cause came on this 26th day of December, 1907, to be heard upon the Bill of Complaint, with the exhibits therewith filed, and upon the papers formerly filed herein, including the special and limited appearance of the defendants at Rules, and their joint and separate answer to the Rule herein, returnable on June 27, 1907, and upon the proceedings and orders heretofore had and entered in this cause, and upon the demurrer of Robert R. Prentis (substituted defendant for Beverley T. Crump), which has been duly set down to be argued, and upon the joint and separate plea of Henry C. Stuart, Joseph E. Willard and R. T. Wilson, three of the defendants in the above styled suit, filed in this cause on the 5th day of August, 1907, which said plea has also been duly set down to be argued, and upon the joint and several plea of *res adjudicata* filed

by leave of court on the 10th day of September, 1907, in this cause by Robert R. Prentis (substituted defendant for Beverley T. Crump), Henry C. Stuart, and Joseph E. Willard, individually and
300 as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of said Commission, which said plea of *res adjudicata* has also been duly set down to be argued.

And this cause having been fully argued by counsel, and the court, having fully considered the record herein and the argument of counsel, and, being of the opinion that the demurrer of said defendant Robert R. Prentis is not well founded in law, it is now adjudged, ordered and decreed that the said demurrer be, and the same is, hereby over-ruled;

And the court, being further of the opinion that the joint and separate plea of the said Henry C. Stuart, Joseph E. Willard and R. T. Wilson, set down to be argued as aforesaid, is also not sufficient in law, the court doth now further adjudge, order and decree that the said plea be and the same is hereby over-ruled as not being good in law;

And the court, being further of the opinion that the joint and several plea of *res adjudicata* of Robert R. Prentis (substituted defendant for Beverley T. Crump), Henry C. Stuart and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of said Commission, set down to be argued as aforesaid, is also not sufficient in law, the court doth now further adjudge, order and decree that the said plea of *res adjudicata* be and the same is hereby over-ruled as being not good in law;

And the said Robert R. Prentis, standing upon his demurrer, and the said Henry C. Stuart, Joseph E. Willard, and R. T. Wilson, standing upon the said joint and separate plea filed in this cause on the 5th day of August, 1907, and the said Robert R. Prentis (substituted defendant in the place of Beverley T. Crump),
301 Henry C. Stuart, and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of said State Corporation Commission of Virginia, standing upon said plea of *res adjudicata* filed in this cause on the 10th day of September, 1907, and upon the joint and separate Answer of the defendants to said Rule returnable on June 27th, 1907, and each and all of them declining to answer the bill, it is now, upon consideration thereof, finally adjudged, ordered and decreed that the Bill of Complaint in this cause be, and the same is, hereby sustained and taken for confessed;

And this court, being of opinion that the order of the State Corporation Commission of Virginia of the 27th day of April, 1907, complained of in the Bill, violates the rights of the Complainant under the Constitution of the United States, and is in contravention thereof, as alleged in the bill, and that accordingly the Complainant is entitled to the relief prayed for in said Bill, as set forth therein, doth so adjudge, order and decree, and doth further adjudge, order and decree that the interlocutory injunction awarded in this cause

on the 10th day of July 1907, be, and the same is, hereby made perpetual, and accordingly:

1. That the defendants Robert R. Prentis, Henry C. Stuart, and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and each and all of their successors in office, each and every of their servants, agents and employees, be, and they hereby are, perpetually restrained and enjoined from publishing, or having published, in any newspaper published in the City of Richmond, Virginia, as against the Complainant herein, the general order of the State Corporation Commission of Virginia bearing date the 27th day of April 1907, in respect to passenger rates, in the bill in this cause mentioned, and from taking any
302 other step or steps whatsoever under the constitution or laws of the State of Virginia, or otherwise, to enforce against the said Complainant the requirements of said order.

2. That the defendant Richard T. Wilson, Clerk of the State Corporation Commission of Virginia, his successors in office, and his servants, agents and employés, be, and they hereby are, perpetually restrained and enjoined from publishing, or having published, as against said Complainant herein, said order of the State Corporation Commission of Virginia in any newspaper published in the City of Richmond, Virginia.

3. That the owners, proprietors and managers of any and all newspapers published in the City of Richmond, Virginia, and the agents of any such owners, proprietors or managers of any such newspapers published in the City of Richmond, Virginia, be, and they and each and every one of them are, hereby perpetually enjoined and restrained from publishing or having published, as against the Complainant herein, under the direction of the State Corporation Commission of Virginia, or of the Clerk thereof, said general order of said State Corporation Commission of Virginia, entered on the 27th day of April, 1907.

4. That the bonds heretofore given by the complainant in this cause, be, and the same hereby are, released and canceled, and the Complainant and the sureties thereon are hereby released and discharged from any and all liability in respect thereto.

5. That a writ of injunction issue out of this Court, and under the seal thereof, directed to the said defendants, commanding, enjoining and restraining them, as hereinbefore set forth, which injunction shall be perpetual, save as is hereinafter provided.
303 But it is further adjudged, ordered and decreed that the defendants, members of, and the clerk to, the said Corporation Commission of Virginia, respectively, as set forth in these proceedings, may hereafter, in the event that the circumstances and conditions shall have changed so that the rates fixed in the order entered by said Commission on the 27th day of April, 1907, shall not, under such changed circumstances and conditions, be in violation of the constitutional rights of the Complainant invoked in the Bill of Complaint in this suit, apply to this court by such proper proceedings as they may be advised for a further order in that behalf;

And it is further adjudged, ordered and decreed that the Complainant recover of the defendants its costs in this behalf expended, to be taxed by the Clerk.

J. C. PRITCHARD,
U. S. Circuit Judge.

December 26th, 1907.

304 *Injunction.*

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump), HENRY C. STUART, JOSEPH E. WILLARD, and R. T. WILSON, Defendants.

The President of the United States of America to Robert R. Prentis, Henry C. Stuart, Joseph E. Willard, and R. T. Wilson, and to their agents, servants and employees and successors in office, and each and every of them, and to the owners, proprietors and managers of all newspapers published in the City of Richmond, Virginia, and each of them, Greeting:

Whereas the Honorable Judge of the Circuit Court of the United States for the Eastern District of Virginia, has on the 26th day of December, 1907, made perpetual the interlocutory injunction awarded in the above-styled cause on the 10th day of July, 1907.

Now, therefore:

1. The defendants Robert R. Prentis, Henry C. Stuart, and Joseph E. Willard, individually and as constituting the State Corporation Commission of Virginia, and each and all of their successors in office, each and every of their servants, agents, and employees be, and they hereby are, perpetually restrained and
305 enjoined from publishing, or having published, in any newspaper published in the city of Richmond, Virginia, as against the Complainant herein, the general order of the State Corporation Commission of Virginia bearing date the 27th day of April, 1907, in respect to passenger rates, in the bill in this cause mentioned, and from taking any other step or steps whatsoever under the constitution or laws of the State of Virginia, or otherwise, to enforce against the said Complainant the requirements of said order.

2. The defendant Richard T. Wilson, Clerk of the State Corporation Commission of Virginia, his successors in office and his servants, agents and employees, be, and they hereby are, perpetually restrained and enjoined from publishing or having published, as against said Complainant herein, said order of the State Corporation Commission of Virginia in any newspaper published in the City of Richmond, Virginia.

3. The owners, proprietors and managers of any and all newspapers published in the City of Richmond, Virginia, and the agents

of any such owners, proprietors or managers of any such newspaper published in the City of Richmond, Virginia, be and they and each and every one of them are, hereby perpetually enjoined and restrained from publishing or having published, as against the Complainant herein, under the direction of the State Corporation Commission of Virginia, or of the Clerk thereof, said general order of said State Corporation Commission of Virginia, entered on the 27th day of April, 1907.

Hereof fail not under penalty of the law thence ensuing.

306 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of Richmond, Virginia, in said District, this Thirteenth day of January, in the year of our Lord one thousand nine hundred and eight, and of our Independence the 132nd year.

[Seal of United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Marshal's Return.

Executed January 13th, 1908, by delivering in person in the City of Richmond, Va., to Robert R. Prentis, Henry C. Stuart, Joseph E. Willard, R. T. Wilson and to Joseph Bryan, he being the President of the Richmond Times-Dispatch Co., a newspaper published in the City of Richmond, Va., and to Alfred B. Williams, he being the President of the News-Leader, a newspaper published in the City of Richmond, Va., and to A. R. Holderby, Jr., he being the Secretary-Treasurer and likewise a director of the Evening Journal, a newspaper published in the City of Richmond, Va., to each of them a true copy of this injunction order.

MORGAN TREAT,
United States Marshal.

307 *Petition for Appeal.*

Filed December 26th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump), HENRY C. STUART, JOSEPH E. WILLARD, and R. T. WILSON, Defendants.

To the Honorable J. C. Pritchard, Judge of said Court:

Your petitioners, the above-named defendants, and each of them, individually, and also in the capacity in which they are respectively

impleaded in this cause, respectfully represent and complain that, in the record and proceedings had in said cause, and also in the final decree entered in said cause, on the 26th day of December, 1907, by the said court at its present term, manifest error hath happened and been committed, to the great injury and damage of said defendants.

Wherefore, the said defendants, and each of them, individually and also in the capacity in which they are respectively impleaded in said cause, conceiving themselves aggrieved, by said error, as aforesaid, hereby respectfully appeal from said decision and decree to the Supreme Court of the United States; and they pray that this, their said appeal, may be allowed, and that a transcript of the record, papers, and proceedings, upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States; and also that an order be made fixing the amount of
308 security which said defendants shall give and furnish upon such appeal.

Accompanying this petition are the assignments of error required by the rules of the said last-named court, and said defendants are ready to give and furnish the bond likewise required by said rules.

And your petitioners will ever pray, etc.

Dated December 26th, 1907.

WILLIAM A. ANDERSON,
Richmond, Va.,
A. C. BRAXTON,
Richmond, Va.,
JOHN W. DANIEL,
Lynchburg, Va.,
Attorneys and Solicitors for the said Defendants and Appellants.

309 *Assignment of Errors.*

Filed December 26th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump), HENRY C. STUART, JOSEPH E. WILLARD, and R. T. WILSON, Defendants.

Come now the said defendants, and each of them individually, and also in the capacity in which they are respectively impleaded in this cause, and file the following assignment of errors along with and accompanying their petition for appeal from the final decree entered by this Honorable Court, at its present term, on the 26th day of December, 1907, in the above-entitled cause, upon which errors they and each of them will rely, upon their said appeal:

First.

That the court erred in assuming, asserting and retaining jurisdiction of said defendants, and of said cause.

Second.

That the court erred in not sustaining the validity of the several constitutional and statutory provisions of the laws of Virginia, creating the State Corporation Commission of Virginia, and prescribing its powers and modes of procedure, which said provisions are set forth in the record of said cause, and which were, by the complain-
310 ant in said cause, "claimed to be in contravention of the Constitution of the United States."

Third.

That the court erred in finding and adjudging that the "law" of the Commonwealth of Virginia, embodied in and created by the order of the State Corporation Commission of Virginia, dated April 27th, 1907, and set forth in the record of said cause, was, as "claimed to be," by the complainant in said cause, "in contravention of the Constitution of the United States."

Fourth.

That the court erred in overruling the demurrer to the bill in said cause.

Fifth.

That the court erred in overruling the joint and separate plea filed by three of the defendants in said cause on August 5th, 1907.

Sixth.

That, if the court had jurisdiction of said cause, and of said defendants, then it erred in overruling the plea of *Res Adjudicata* filed by the defendants in said cause.

Seventh.

That the court erred in not making, rendering and entering a decree in favor of the said defendants, and against the said complainant.

The foregoing specific assignments of error cover, as it is believed, the requirements of the Rule under which they are filed; but the said defendants, as Appellants, by their counsel, in view of the im-
311 portance of this cause and the wide range of subjects necessarily involved in its proper consideration and determination, will pray the Honorable, the Supreme Court of the United States, for leave to discuss, at the hearing, all the subjects involved in said appeal, and not to confine them to the specific points designated above.

Wherefore, the said defendants, as Appellants, pray that the final decision and decree of the said court in this cause be reversed by the Supreme Court of the United States, and the said Circuit Court of the United States for the Eastern District of Virginia be directed to enter an order, dismissing this cause, at the costs of said complainant.

Dec. 26th, 1907.

WILLIAM A. ANDERSON,
A. C. BRAXTON,
JOHN W. DANIEL,
Attorneys and Solicitors for the said Defendants and Appellants.

312 *Order Allowing Appeal and Fixing Amount of Bond.*

Entered and Filed December 26th, 1907.

In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
versus
ROBERT R. PRENTIS (Substituted Defendant for Beverley T. Crump) and Others, Defendants.

Upon motion of William A. Anderson, A. Caperton Braxton and John W. Daniel, Esquires, counsel for defendants, and on filing petition of Henry C. Stuart, Joseph E. Willard, Robert R. Prentis, and R. T. Wilson, individually and also in the capacity in which they are respectively herein impleaded, for an order allowing an appeal, together with an assignment of errors accompanying the said petition,

It is ordered, on this, the 26th day of December, 1907, that an appeal be, and is hereby in open court allowed to the Supreme Court of the United States from the final order and decree entered herein on the 26th day of December, 1907, at this term of this court, perpetuating the injunction heretofore awarded against said defendants; that the amount of the bond upon said appeal be, and hereby is, fixed at the sum of One Thousand Dollars; and that a certified transcript of the record and proceedings herein be forthwith transmitted to the Supreme Court of the United States.

December 26th, 1907.

J. C. PRITCHARD,
U. S. Circuit Judge.

313 *Appeal Bond.*

Filed January 14th, 1908.

Know all men by these presents, That we, Richard T. Wilson of Richmond, Virginia, as principal, and Virginia Trust Company as

surety, are held and firmly bound unto Southern Railway Company in the full and just sum of One Thousand Dollars to be paid to the said Southern Railway Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 14th day of January, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Circuit Court of the United States for the Eastern District of Virginia, in a suit depending in said Court, *between* Southern Railway Company, is Complainant, and Robert R. Prentis (Substituted defendant for Beverley T. Crump), Henry C. Stuart, Joseph E. Willard and Richard T. Wilson are Defendants, a decree was rendered against the said Robert R. Prentis, (Substituted defendant for Beverley T. Crump), Henry C. Stuart, Joseph E. Willard, individually, and as constituting the State Corporation Commission of Virginia, and Richard T. Wilson, Clerk of the said State Corporation Commission of Virginia, and the said Robert R. Prentis, (Substituted defendant for Beverley T. Crump), Henry C. Stuart, Joseph E. Willard, individually, and as constituting the State Corporation Commission of Virginia, and Richard T. Wilson, Clerk of the said State Corporation Commission of Virginia, having obtained an appeal to reverse the decree in the
314 aforesaid suit, and a citation directed to the said Southern Railway Company citing and admonishing it to be and appear at a Supreme Court of the United States, at the city of Washington, on the day in the said citation mentioned:—

Now, the condition of the above obligation is such, That if the said Robert R. Prentis, (Substituted defendant for Beverley T. Crump), Henry C. Stuart, Joseph E. Willard and Richard T. Wilson shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

RICHARD T. WILSON. [SEAL.]
VIRGINIA TRUST CO.,
By L. D. AYLETT, *Sec'ty.*

[Seal of Virginia Trust Co.]

Sealed and delivered in presence of

JOSEPH P. BRADY,
Clerk U. S. Circuit Court for the Eastern District of Virginia.

Approved by—

J. C. PRITCHARD,
United States Circuit Judge.

315 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Southern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, on the 10th day of February, A. D., 1908, pursuant to an appeal, duly allowed by the Circuit Court of the United States for the Eastern District of Virginia, and filed in the clerk's office of said Court, on the 26th day of December, A. D., 1907; in a cause wherein Robert R. Prentis, (Substituted defendant for Beverley T. Crump), Henry C. Stuart and Joseph E. Willard, individually, and as constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of said State Corporation Commission of Virginia, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. C. Pritchard, Judge of the Circuit Court of the United States for the Eastern District of Virginia, this 14th day of January, in the year of our Lord one thousand nine hundred and eight, and of our Independence the 132nd year.

J. C. PRITCHARD,
United States Circuit Judge.

Service of the above citation is hereby admitted this 15th day of January, 1908.

ALFRED P. THOM,
Attorney for Appellee, Washington, D. C.

316 *Order Transmitting Record.*

And, thereupon, it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

JOSEPH P. BRADY, *Clerk.*

Certificate of Clerk.

UNITED STATES OF AMERICA, *Eastern District of Virginia, ss:*

I, Joseph P. Brady, Clerk of the Circuit Court of the United States for the Eastern District of Virginia, in the Fourth Judicial Circuit, do certify that the above and foregoing is a full, true and correct transcript of the record and proceedings of said Circuit Court,

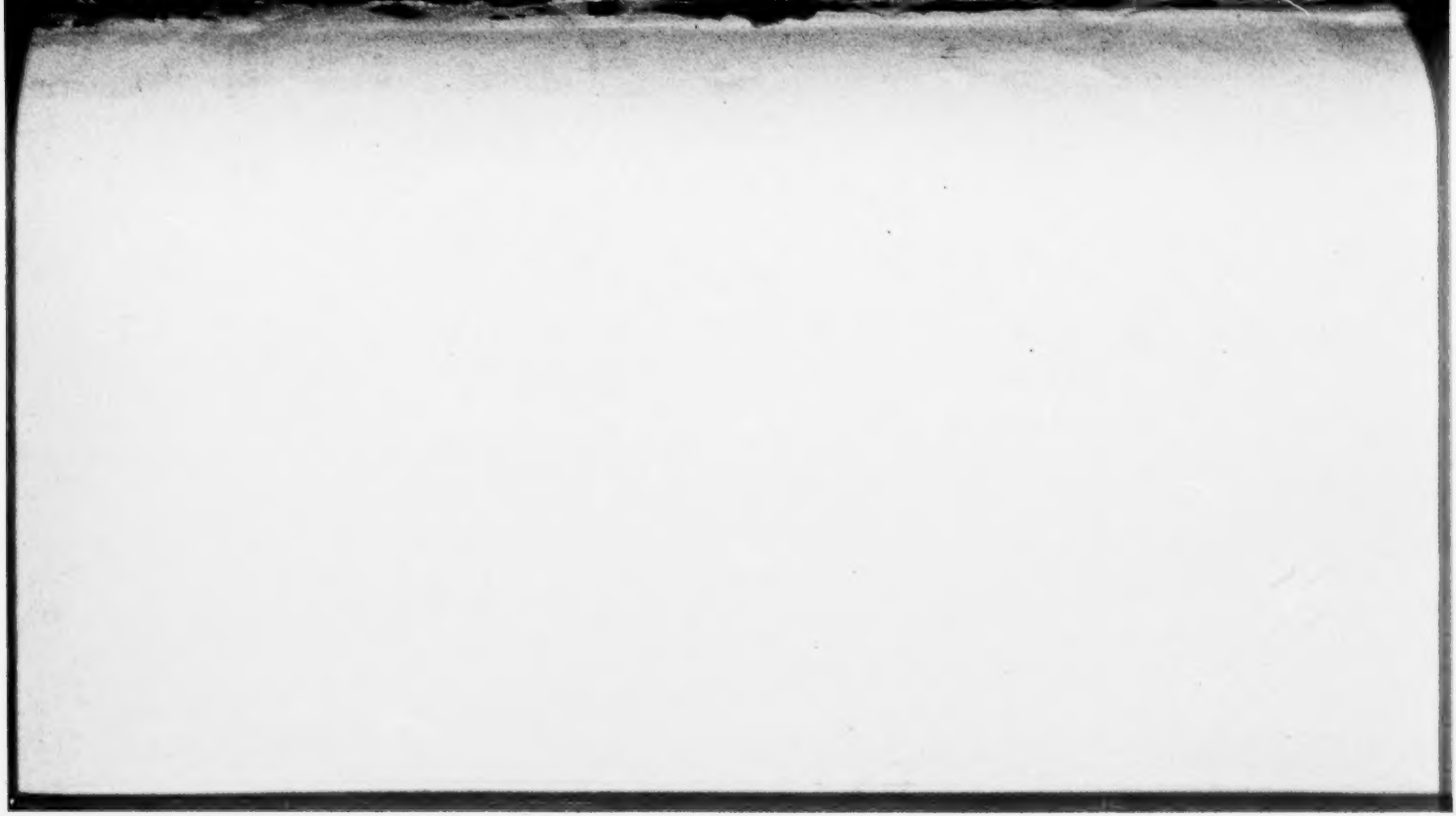
together with all things thereunto relating, in the therein entitle cause.

In testimony whereof, I hereunto set my hand and affix the se of said Circuit Court, at the City of Richmond, Virginia, this 3 day of February, A. D., 1908.

[Seal United States Circuit Court, Eastern District of Virginia

JOSEPH P. BRADY,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Endorsed on cover: File No. 21,014. E. Virginia C. C. U. Term No. 275. Robert R. Prentis, Henry C. Stuart, and Joseph Willard, individually and as constituting the State Corporatio Commission of Virginia *et al.*, *vs.* Southern Railway Compan Filed February 10th, 1908. File No. 21,014.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 606.

ROBERT R. PRENTIS ET ALS., INDIVIDUALLY AND AS THE STATE CORPORATION COMMISSION OF VIRGINIA, ET ALS., APPELLANTS,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

MOTION TO ADVANCE.

And now comes the Appellee in the above-entitled cause and upon the record therein in this Court, moves the Court that said cause be advanced and set down for hearing at the earliest convenient day of the present term.

Statement of the Matter Involved.

Southern Railway Company instituted a suit in equity in the Circuit Court of the United States for the Eastern District of Virginia against the members of the State Corporation Commission of Virginia, individually and as constituting said Commission, and against its clerk, to prevent the

execution of an order of said Commission ordering a reduction of the intrastate passenger rates of appellee in the State of Virginia, and as ground for such relief averred that said order was repugnant to the Constitution of the United States.

A final decree was entered by the Circuit Court declaring the order complained of to be repugnant to the Constitution of the United States and finally enjoining its execution.

The cause was thereupon brought here by the Appellants, claiming that the Circuit Court of the United States was without jurisdiction to hear and determine the same, and assigning errors as will appear from the record.

Reasons for This Application.

The questions involved are of great public importance at this time and the public interests will be greatly promoted by an early determination of the issues involved. Serious financial loss is being sustained from day to day, which can only be avoided by a decision of this Honorable Court. An early hearing and speedy decision are important in the interest of public order, and are essential to preserve the rights of the parties, which largely affect the public interests. The operations of the appellee, which substantially affect the public, are thrown into confusion and cannot be adjusted or carried on in an orderly way until this Honorable Court shall determine the issues involved.

ALEXANDER HAMILTON,
WILLIAM B. MCILWAINE,
Counsel for Appellee.

We, as counsel for Appellants, concur in the foregoing application because of the importance of the public interests involved to the Commonwealth of Virginia, as well as to the Appellants and to the Appellee, and for reasons which it is unnecessary to further detail consider that there is urgent need for a speedy hearing and decision of the cause.

It is obvious from an inspection of the record and from the very nature of this case that the common good would be subserved by a speedy solution, as soon as possible, of the questions at variance between the parties.

WILLIAM A. ANDERSON,
Attorney General of Virginia,
A. C. BRAXTON,
JOHN W. DANIEL,
Counsel for Appellants.

WASHINGTON, D. C., *February* 24, 1908.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 607.

ROBERT R. PRENTIS ET ALS., INDIVIDUALLY AND AS THE STATE CORPORATION COMMISSION OF VIRGINIA, ET ALS., APPELLANTS,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

MOTION TO ADVANCE.

And now comes the Appellee in the above-entitled cause and upon the record therein in this Court, moves the Court that said cause be advanced and set down for hearing at the earliest convenient day of the present term.

Statement of the Matter Involved.

Southern Railway Company instituted a suit in equity in the Circuit Court of the United States for the Eastern District of Virginia against the members of the State Corporation Commission of Virginia, individually and as constituting said Commission, and against its clerk, to prevent the

execution of an order of said Commission ordering a reduction of the intrastate passenger rates of appellee in the State of Virginia, and as ground for such relief averred that said order was repugnant to the Constitution of the United States.

A final decree was entered by the Circuit Court declaring the order complained of to be repugnant to the Constitution of the United States and finally enjoining its execution.

The cause was thereupon brought here by the Appellants, claiming that the Circuit Court of the United States was without jurisdiction to hear and determine the same, and assigning errors as will appear from the record.

Reasons for This Application.

The questions involved are of great public importance at this time and the public interests will be greatly promoted by an early determination of the issues involved. Serious financial loss is being sustained from day to day, which can only be avoided by a decision of this Honorable Court. An early hearing and speedy decision are important in the interest of public order, and are essential to preserve the rights of the parties, which largely affect the public interests. The operations of the appellee, which substantially affect the public, are thrown into confusion and cannot be adjusted or carried on in an orderly way until this Honorable Court shall determine the issues involved.

HENRY T. WICKHAM,
HENRY TAYLOR, JR.,
Counsel for Appellee.

We, as counsel for Appellants, concur in the foregoing application because of the importance of the public interests involved to the Commonwealth of Virginia, as well as to the Appellants and to the Appellee, and for reasons which it is unnecessary to further detail consider that there is urgent need for a speedy hearing and decision of the cause.

It is obvious from an inspection of the record and from the very nature of this case that the common good would be subserved by a speedy solution, as soon as possible, of the questions at variance between the parties.

WILLIAM A. ANDERSON,
Attorney General of Virginia,
A. C. BRAXTON,
JOHN W. DANIEL,
Counsel for Appellants.

WASHINGTON, D. C., *February* 24, 1908.

FILED
APR 4 1903
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

No. 272

ROBERT R. PRENTIS ET ALS., Individually and as the State Corporation Commission of Virginia et als.,

Appellants,

versus

CHESAPEAKE WESTERN RAILWAY, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

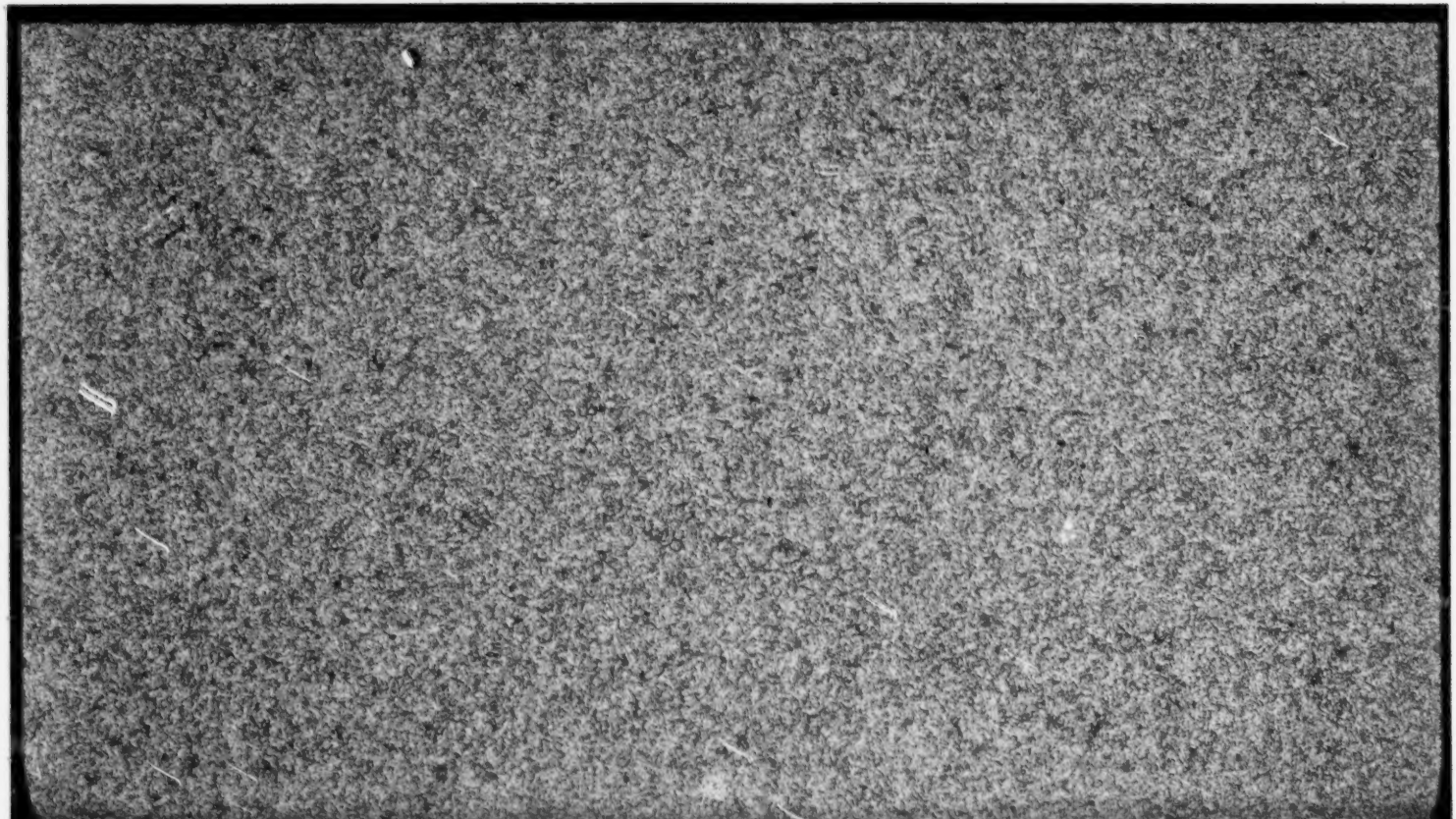
MOTION TO ADVANCE.

S. S. P. Patteson,
Counsel for Appellee.

William A. Anderson,
Attorney General of Virginia.

A. C. Braxton,

John W. Daniel,
Counsel for Appellants.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 608.

ROBERT R. PRENTIS ET ALS., INDIVIDUALLY AND AS THE STATE CORPORATION COMMISSION OF VIRGINIA ET ALS., APPELLANTS,

versus

CHESAPEAKE WESTERN RAILWAY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

MOTION TO ADVANCE.

And now comes the appellee in the above entitled cause, and upon the record therein in this court, moves the court that said cause be advanced and set down for hearing at the earliest convenient day of the present term.

STATEMENT OF THE MATTER INVOLVED.

Chesapeake Western Railway instituted a suit in equity in the Circuit Court of the United States for the Eastern District of Virginia against the members of the State Corporation

Commission of Virginia, individually and as constituting said Commission, and against its clerk, to prevent the execution of an order of said Commission ordering a reduction of the intrastate passenger rates of appellee in the State of Virginia, and as ground for such relief averred that said order was repugnant to the Constitution of the United States.

A final decree was entered by the Circuit Court declaring the order complained of to be repugnant to the Constitution of the United States and finally enjoining its execution.

The cause was thereupon brought here by the appellants, claiming that the Circuit Court of the United States was without jurisdiction to hear and determine the same, and assigning errors as will appear from the record.

REASONS FOR THIS APPLICATION.

The questions involved are of great public importance at this time and the public interests will be greatly promoted by an early determination of the issues involved. Serious financial loss is being sustained from day to day, which can only be avoided by a decision of this Honorable Court. An early hearing and speedy decision are important in the interest of public order, and are essential to preserve the rights of the parties, which largely affect the public interests. The operations of the appellee, which substantially affect the public, are thrown into confusion and cannot be adjusted or carried on in an orderly way until this Honorable Court shall determine the issues involved.

S. S. P. Patteson,

Counsel for Appellee.

We, as counsel for appellants, concur in the foregoing application, because of the importance of the public interests involved to the Commonwealth of Virginia, as well as to the appellants and to the appellee, and for reasons which it is unnecessary to further detail consider that there is urgent need for a speedy hearing and decision of the cause.

It is obvious from an inspection of the record and from the very nature of this case that the common good would be subserved by a speedy solution, as soon as possible, of the questions at variance between the parties.

WILLIAM A. ANDERSON,
Attorney General of Virginia.
A. C. BRAXTON,
JOHN W. DANIEL,
Counsel for Appellants.

Washington, April 2nd, 1908.

Office Supreme Court, U. S.
FILED.
MAY 12 1908
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM 1907

No. 273

Robert R. Prentis, et al., - - - Appellants

v.

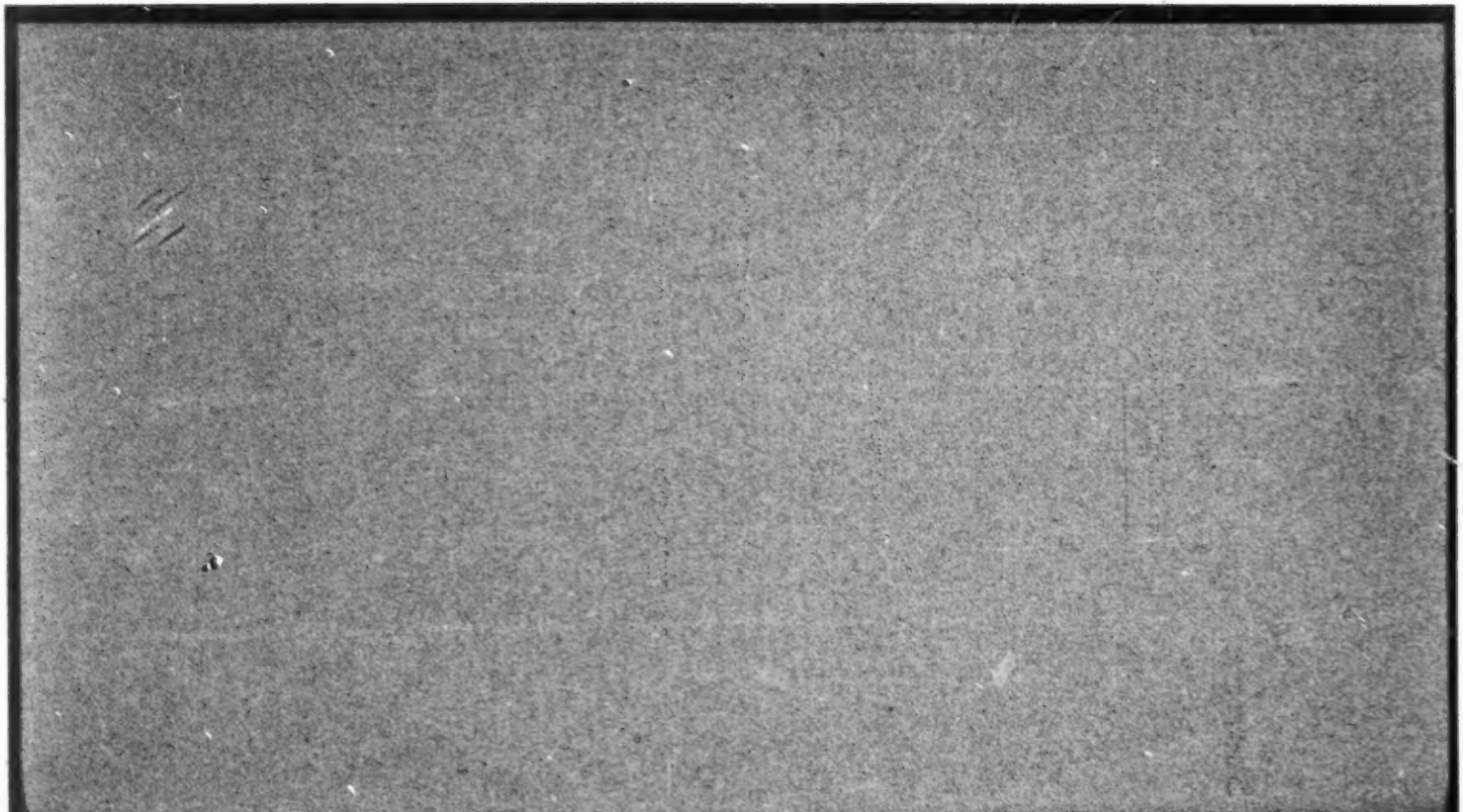
Louisville & Nashville Railroad Company, Appellee

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

NOTICE and MOTION by APPELLEE TO ADVANCE for HEARING

HENRY LANE STONE,
Solicitor for Appellee.

CRUMP & CARTER PRINTING CO., LOUISVILLE, KY.



Supreme Court of the United States

OCTOBER TERM 1907

No. 609

ROBERT R. PRENTIS, ET AL., . . . APPELLANTS

v.

LOUISVILLE & NASHVILLE RAILROAD CO., APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

NOTICE OF MOTION TO ADVANCE FOR HEARING

To Hon. WILLIAM A. ANDERSON, Attorney General of Virginia, Hon. ALLEN C. BRAXTON, and Hon. JOHN W. DANIEL, Solicitors for Appellants:

Please take notice that I shall make a motion for the appellee before the Court at the opening of its session on Monday, May 11, 1908, or as soon thereafter as counsel can be heard, (1) to advance the above styled case for hearing and assign the same for argument on the first Tuesday of the next term (October 13) after the cases already set down for that day; (2) that it be heard and argued as one case with the following cases, heretofore advanced and assigned for argument on that day, viz:

No. 606. Robert R. Prentis, et al., v. Atlantic Coast Line Railroad Company;

No. 607. Same v. Chesapeake & Ohio Railway Co.;

No. 608. Same v. Chesapeake Western Railway Co.;

No. 610. Same v. Norfolk & Western Railway Co.;

No. 611. Same v. Southern Railway Co.;

and (3) that counsel for each side shall be allowed four hours in the argument of these cases.

And, in support of said motion, will file and present to the Court at the hearing thereof the grounds therefor, a copy of which motion and grounds is herewith served upon you, dated May 1, 1908.

HENRY LANE STONE,
Solicitor for Appellee.

Service of the foregoing notice is hereby accepted. This May 1, 1908, and we concur in the motion to advance.

WILLIAM A. ANDERSON,
JOHN W. DANIEL, by W. A. A.,
A. C. BRAXTON,
Solicitors for Appellants.

Supreme Court of the United States

OCTOBER TERM 1907.

No. 609.

ROBERT R. PRENTIS, ET AL., . . . APPELLANTS

v.

LOUISVILLE & NASHVILLE RAILROAD CO., APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION BY APPELLEE TO ADVANCE FOR HEARING

And now comes the appellee and moves the Court (1) to advance this case for hearing and assign the same for argument on the first Tuesday of the next term (October 13), after the cases already set down for that day; (2) that it be heard and argued as one case with the following cases heretofore advanced and assigned for argument on that day, viz:

No. 606. Robert R. Prentis, et al., v. Atlantic Coast Line Railroad Co.;

No. 607. Same v. Chesapeake & Ohio Railway Co.

No. 608. Same v. Chesapeake Western Railway Company;

No. 610. Same v. Norfolk & Western Railway Company;

No. 611. Same v. Southern Railway Co.;

and (3) that counsel for each side shall be allowed four hours in the argument of these cases.

And, in support of said motion, the following grounds are presented:

1. This case involves the same questions as those to be argued and decided in the five cases referred to already advanced and set for argument as one case at the next term on October 13, 1908, and it will be more convenient to appellants' counsel (who represent the appellants in these six cases) as well as to appellee's counsel that the argument in all of them be made at the same time instead of having the argument of this case at a later and different time, when it shall be reached in due course on the regular call of the docket.

2. The Court's decision in the five cases above mentioned, already advanced, will likely be controlling in this case, and counsel for appellee should, therefore, be present and allowed to participate in the argument of the questions involved at the first hearing; otherwise (unless the decrees of the court below in those cases shall be affirmed), appellee's counsel at the subsequent hearing and argument of this case would labor under the disadvantage of having a practically insurmountable precedent to overcome.

HENRY LANE STONE,
Solicitor for Appellee.

Office Supreme Court, U. S.
FILED.
OCT 9 1908
JAMES H. McKENNEY,
CLERK.

No. 273. OCTOBER TERM, 1908.

IN THE

Supreme Court of the United States

Robert R. Prentis *et al.*, Appellants,

vs.

Louisville and Nashville Railroad Company, Appellee.

SEPARATE BRIEF OF ARGUMENT OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLEE, ON ARBITRARY CLASSIFICATION BY THE STATE CORPORATION COMMISSION OF VIRGINIA IN FIXING THE PASSENGER RATES COMPLAINED OF.

HENRY L. STONE.
Of Counsel.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

Robert R. Prentis et al., *Appellants*, v. *Louisville and Nashville Railroad Company, Appellee.*	October Term, 1908. No. 273.

SEPARATE BRIEF OF ARGUMENT OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLEE, ON

ARBITRARY CLASSIFICATION BY THE STATE CORPORATION COMMISSION OF VIRGINIA IN FIXING THE PASSENGER RATES COMPLAINED OF.

The Bill of Complaint of the Louisville and Nashville Railroad Company (Record No. 273, Article 15, page 15).

> "15. This complainant further shows that there is no just reason for making a rule for some of the railroads different from that made for the complainant in respect to its passenger charges, and that there is no reasonable basis for such difference. Each of the carriers in said State of Virginia is, under the Constitution of the United States, entitled to charge a reasonable compensation for the services rendered, and the difference in rates ordered by the said Commission creates

> a merely arbitrary classification based upon no power or sufficient reason. This complainant is, therefore, advised that the effect of said order in making such difference in classification and in permitting one carrier to charge for the same service in Virginia a greater sum than is permitted to another carrier in Virginia is to deprive this complainant of the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, which this complainant, in this regard, here again respectfully sets up and claims."

In paragraph 15 just quoted of the bill of the Louisville & Nashville Railroad Company, the order of the Commission dated April 27, 1907, is attacked on the ground that the several railroad companies in Virginia were classified arbitrarily by the Commission upon no proper or sufficient grounds, and thereby a difference was made in permitting one carrier to charge for the same service a greater sum than is permitted to another carrier, thus depriving the complainant of the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States. Neither the Constitution nor the Statute of Virginia authorizes the Commission to make any classification of railroad companies. The Commission is, however, authorized by the Constitution and laws of that State to prescribe "classifications of traffic." This phrase frequently occurs, both in the Constitution and laws, to be found in the appendix to this brief, but nowhere is the power of the Commission extended to the classification of the railroads themselves or so as to permit one to charge more than another, either for the transportation of passengers or freight. Furthermore, in the order of the Commission complained of no reason is assigned for the classification of the railroads of Virginia, as therein set forth, or explaining the grounds upon which some are permitted to charge for passengers 3½¢ per

mile, others 3¢ per mile, others 2½¢ per mile, and still others only 2¢ per mile, including the Louisville & Nashville Railroad Company and four of the other appellees in these cases.

In Dow *v.* Beidelman, 125 U. S. 680, a *statute* fixing different rates for different railroads, reasonably classified, was sustained. This court at page 691 said:

> "The Legislature in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the Legislature. *If the same rule is applied to all railroads of the same class*, there is no violation of the constitutional provision securing to all the equal protection of the laws."

In Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, the syllabus reads:

> "The statute of Kansas of March 3, 1897, entitled 'An Act defining what shall constitute public stock yards, defining the duties of the person or persons operating the same, *and regulating all charges thereof*, and removing restrictions in the trade of dead animals, and providing penalties for violations of this Act,' is in violation of the Fourteenth Amendment of the Constitution of the United States in that it applies only to the Kansas City Stock Yards Company, and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws."

Three of the justices were of the further opinion that the Kansas statute deprived the Stock Yards Company of its property without due process of law. As to this

the other six refrained from expressing any opinion, but upon the proposition laid down in the syllabus the entire nine Justices concurred. Justice Harlan says, at page 114, speaking for the six to whom we have referred:

> "We assent to the judgment of reversal—so far as the merits of this case are concerned—upon the ground that the statute of Kansas in question is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws."

See especially pages 104, 112.

All that part of the opinion of Justice Brewer from pages 102 to 112, inclusive, relating to the contention that the equal protection of the laws was denied, met with the approval of the entire court. What he said is too extended for quotation, but the drift of it all is illustrated by the quotation made at page 109, from Cooley's Constitutional Limitations, 5th Ed., 484, 486, and 7th Ed., 559, as follows:

> "Every one has a right to demand that he be governed by general rules and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court, and the countryman at plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

In Yick Wo *v.* Hopkins, 118 U. S. 356, this court at pages 373, 374, said:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in several cases that are cited."

In L. & N. R. R. Co. v. Railroad Commission of Tennessee, 19 Fed. 679, the opinion holding the Tennessee statute under consideration to be unconstitutional, was delivered by Circuit Judge Baxter and concurred in by Judges Hammond and Key. The statute is set out in its entirety in that decision at pages 682, 687, inclusive, and the opinion is very full and instructive upon the question of the power of a Railroad Commission to discriminate. Bearing in mind the powers attempted to be exercised by the Virginia Commission of fixing a passenger rate of two cents for some companies and higher rates for their competitors so much of the opinion of Judge Baxter as bears on this point, at page 695, is quoted as follows:

> "Notwithstanding the act under consideration professes to regulate railroad operations, it, in effect, places the business of all railroad corporations in the State under defendant's supervision and control. In addition to the authority to revise their tariffs of charges, as hereinbefore shown, the commissioners may, for undisclosed reasons, and without accountability to any one, give better rates to one corporation than to another."

So with respect to the order complained of, the Commission has assumed the power "for undisclosed reasons" to fix the passenger rates for some companies and higher rates for others.

Again, Judge Baxter, at page 696, states:

> "Whenever, in their judgment, * * * 'any change in rates' is desirable, * * * the commissioners 'shall give information in writing' to the corporation. * * * These powers in addition to the authority to prescribe rates, include all the incidents pertaining to the absolute ownership of property. In the exercise of them the commission can limit receipts and dictate expenditures, *insure prosperity to one company and drive another into bankruptcy*. * * *
>
> "But the defendants say that their revisions of tariff rates and *suggestions* in regard to the methods of conducting business are not obligatory on the railroad corporations; that the statute is advisory and not mandatory in its terms. This is true; upon the face of it, the railroad companies are left to adopt or reject the rates fixed, and ignore the suggestions made by the commissioners. But if they decline to conform to the rates fixed by the commissioners, they do so at the peril of subjecting themselves to a multiplicity of suits by the State and by individuals, to be tried by juries interested in the reduction of charges, and upon the anomalous principles declared by the act, which, by force of the *prima facie* effect therein given to the *ex parte* action of the commissioners, reverses the presumption of innocence hitherto accorded to all defendants in criminal or quasi criminal proceedings, and casts the burden of exculpation on the accused. That such litigation will follow is not at all problematical; it is certain. *The authors of this statute have been careful to place this beyond doubt.*"

Further on this eminent Judge, in the same case, states:

> "By the slow but certain operation of this statute, the commission can, if they want to, gradually take and appropriate all the railroad property in the State to the public use, without that just compensation provided for by the Constitution. In a word, the commission, under the terms of this act,

hold, in so far as railroad corporations are concerned, the issue of life and death as in the hollow of their hands."

In Raymond *v.* Chicago Union Traction Co., 207 U. S. 20, this court held:

> "The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislative, executive or judicial authority, but relate to all instrumentalities through which the State acts."

As further illustrative of the protection guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, the court is referred to the opinion of Mr. Justice Strong in the case of *Ex parte* Virginia, 100 U. S. 339, 346, 347, and in reading this quotation the court is asked to keep in mind the thought of the powers and authority claimed for the Virginia Commission. In that case Mr. Justice Strong, with respect to the provisions of the Fourteenth Amendment, forbidding the denial of the equal protection of the laws, said:

> "They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then

the State has clothed one of its agents with power to annul or to evade it.

"But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to *enforce* its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon persons who are the agents of the State in the denial of the rights which were intended to be secured."

In Terre Haute & Indianapolis Railroad Co. *v.* State, 159 Ind. 438, the court, speaking by Chief Justice Hadley, said, at pages 454, 455:

"It is the duty of the State to treat its citizens alike, and to see that others who exercise public powers do the same. So when the State should undertake to regulate the tariffs of its railroads, *it must make such tariffs uniform.* It could not require the people between Indianapolis and Terre Haute to pay one mileage rate, and the people between Indianapolis and Madison to pay another."

This court in reversing that case (194 U. S. 579), did so, not because it found any fault with the doctrine above quoted, for the same had so often been repeated and approved by that court that it was no longer the subject of comment or criticism.

These decisions were rendered, in most cases, under the express provisions of statutes, but, as before stated, neither by the express provisions of the Constitution or Statutes of Virginia, nor by necessary implication therefrom, can it be claimed that the Commission of that State has any power to classify the railroad companies operating lines within that State upon any basis whatever, or to make any distinction in the matter of prescribing rates for passengers or freight.

HENRY L. STONE,
Of Counsel for Louisville and Nashville Railroad Co., Appellee in No. 273.

Office Supreme Court, U. S.
FILED.
FEB 25 1908
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ~~610~~. 274

ROBERT R. PRENTIS ET ALS., INDIVIDUALLY AND AS THE STATE CORPORATION COMMISSION OF VIRGINIA ET ALS., APPELLANTS,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

MOTION TO ADVANCE.

JOSEPH I. DORAN,
LUCIAN H. COCKE,
Counsel for Appellee.
WILLIAM A. ANDERSON,
Attorney General of Virginia,
A. C. BRAXTON,
JOHN W. DANIEL,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 610.

ROBERT R. PRENTIS ET ALS., INDIVIDUALLY AND AS THE STATE CORPORATION COMMISSION OF VIRGINIA, ET ALS., APPELLANTS,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

MOTION TO ADVANCE.

And now comes the Appellee in the above-entitled cause and upon the record therein in this Court, moves the Court that said cause be advanced and set down for hearing at the earliest convenient day of the present term.

Statement of the Matter Involved.

Southern Railway Company instituted a suit in equity in the Circuit Court of the United States for the Eastern District of Virginia against the members of the State Corporation Commission of Virginia, individually and as constituting said Commission, and against its clerk, to prevent the

execution of an order of said Commission ordering a reduction of the intrastate passenger rates of appellee in the State of Virginia, and as ground for such relief averred that said order was repugnant to the Constitution of the United States.

A final decree was entered by the Circuit Court declaring the order complained of to be repugnant to the Constitution of the United States and finally enjoining its execution.

The cause was thereupon brought here by the Appellants, claiming that the Circuit Court of the United States was without jurisdiction to hear and determine the same, and assigning errors as will appear from the record.

Reasons for This Application.

The questions involved are of great public importance at this time and the public interests will be greatly promoted by an early determination of the issues involved. Serious financial loss is being sustained from day to day, which can only be avoided by a decision of this Honorable Court. An early hearing and speedy decision are important in the interest of public order, and are essential to preserve the rights of the parties, which largely affect the public interests. The operations of the appellee, which substantially affect the public, are thrown into confusion and cannot be adjusted or carried on in an orderly way until this Honorable Court shall determine the issues involved.

JOSEPH I. DORAN,
LUCIAN H. COCKE,
Counsel for Appellee.

We, as counsel for Appellants, concur in the foregoing application because of the importance of the public interests involved to the Commonwealth of Virginia, as well as to the Appellants and to the Appellee, and for reasons which it is unnecessary to further detail consider that there is urgent need for a speedy hearing and decision of the cause.

It is obvious from an inspection of the record and from the very nature of this case that the common good would be subserved by a speedy solution, as soon as possible, of the questions at variance between the parties.

WILLIAM A. ANDERSON,
Attorney General of Virginia,
A. C. BRAXTON,
JOHN W. DANIEL,
Counsel for Appellants.

WASHINGTON, D. C., *February* 24, 1908.

FEB 25 1908
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 275

ROBERT R. PRENTIS ET ALS., INDIVIDUALLY AND AS THE STATE CORPORATION COMMISSION OF VIRGINIA ET ALS., APPELLANTS,

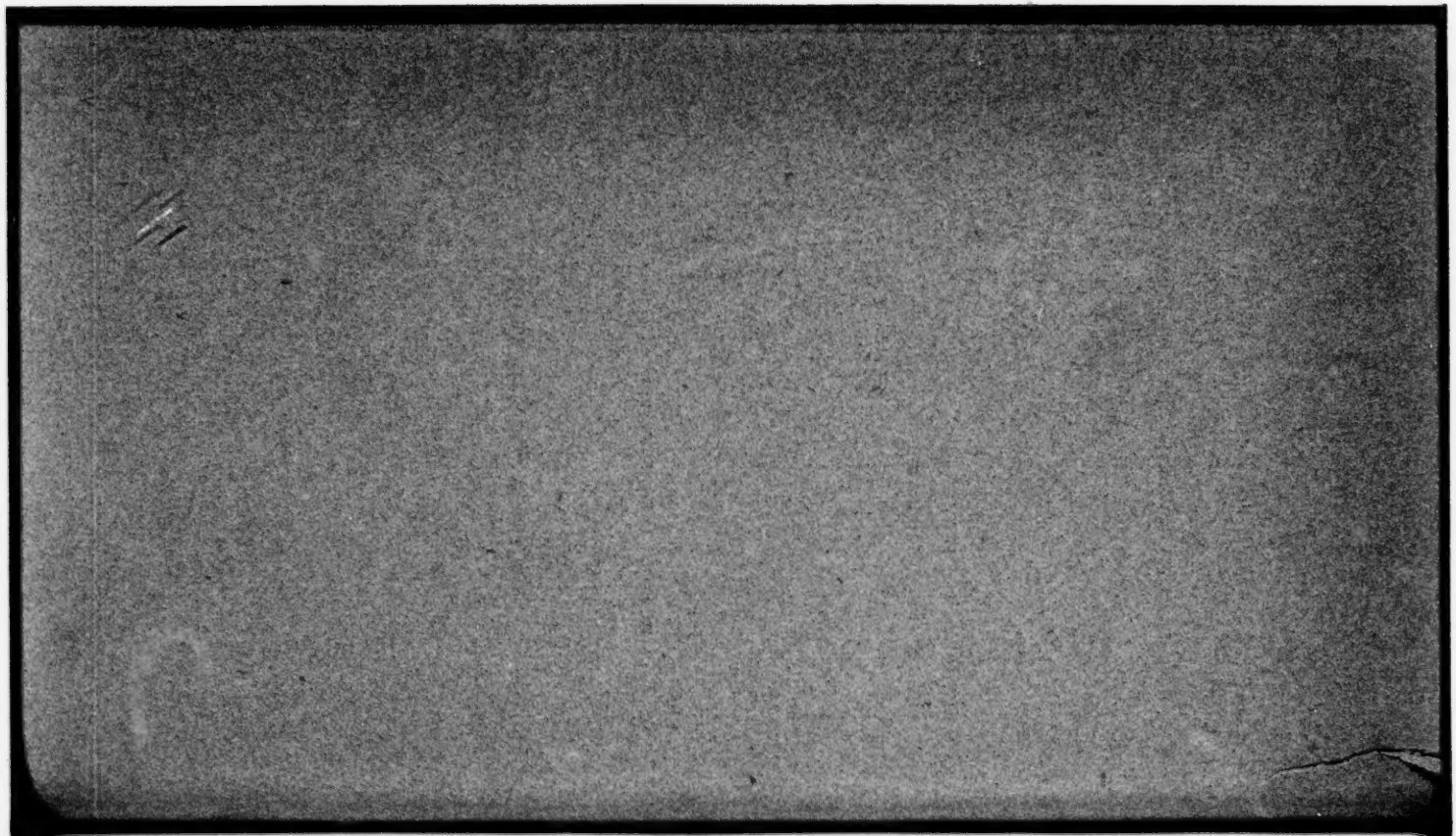
v.

SOUTHERN RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

MOTION TO ADVANCE.

ALFRED P. THOM,
Counsel for Appellee.
WILLIAM A. ANDERSON,
Attorney General of Virginia,
A. C. BRAXTON,
JOHN W. DANIEL,
Counsel for Appellants.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 611.

ROBERT R. PRENTIS ET ALS., INDIVIDUALLY AND AS THE STATE CORPORATION COMMISSION OF VIRGINIA, ET ALS., APPELLANTS,

v.

SOUTHERN RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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And now comes the Appellee in the above-entitled cause and upon the record therein in this Court, moves the Court that said cause be advanced and set down for hearing at the earliest convenient day of the present term.

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execution of an order of said Commission ordering a reduction of the intrastate passenger rates of appellee in the State of Virginia, and as ground for such relief averred that said order was repugnant to the Constitution of the United States.

A final decree was entered by the Circuit Court declaring the order complained of to be repugnant to the Constitution of the United States and finally enjoining its execution.

The cause was thereupon brought here by the Appellants, claiming that the Circuit Court of the United States was without jurisdiction to hear and determine the same, and assigning errors as will appear from the record.

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The questions involved are of great public importance at this time and the public interests will be greatly promoted by an early determination of the issues involved. Serious financial loss is being sustained from day to day, which can only be avoided by a decision of this Honorable Court. An early hearing and speedy decision are important in the interest of public order, and are essential to preserve the rights of the parties, which largely affect the public interests. The operations of the appellee, which substantially affect the public, are thrown into confusion and cannot be adjusted or carried on in an orderly way until this Honorable Court shall determine the issues involved.

Counsel for Appellee.

We, as counsel for Appellants, concur in the foregoing application because of the importance of the public interests involved to the Commonwealth of Virginia, as well as to the Appellants and to the Appellee, and for reasons which it is unnecessary to further detail consider that there is urgent need for a speedy hearing and decision of the cause.

It is obvious from an inspection of the record and from the very nature of this case that the common good would be subserved by a speedy solution, as soon as possible, of the questions at variance between the parties.

William A. Anderson,
Attorney General of Virginia
A. C. Braxton,
John W. Daniel,
Counsel for Appellants.

WASHINGTON, D. C., *February* 24, 1908.

VIRGINIA STATE CORPORATION COMMISSION CASES

IN THE

Supreme Court of the United States

Office Supreme Court, U.
FILED.
OCT 9 1908
JAMES H. McKENNEY

OCTOBER TERM, 1908.

Robert R. Prentis *et al.*, Appellants,
vs.
Atlantic Coast Line Railroad Company, Appellee. } No. 270.

Robert R. Prentis *et al.*, Appellants,
vs.
The Chesapeake and Ohio Railway Co., Appellee. } No. 271.

Robert R. Prentis *et al.*, Appellants,
vs.
Chesapeake Western Railway, Appellee. } No. 272.

Robert R. Prentis *et al.*, Appellants,
vs.
Louisville and Nashville Railroad Company, Appellee. } No. 273.

Robert R. Prentis *et al.*, Appellants,
vs.
Norfolk and Western Railway Co., Appellee. } No. 274.

Robert R. Prentis *et al.*, Appellants,
vs.
Southern Railway Company, Appellee. } No. 275.

BRIEF OF ARGUMENT OF APPELLEES

ALEXANDER HAMILTON,
WM. B. McILWAINE,
H. T. WICKHAM,
HENRY TAYLOR, Jr.,
S. S. P. PATTESON,
HENRY L. STONE,
JOSEPH I. DORAN,
LUCIAN H. COCKE,
ALFRED P. THOM,
JOHN K. GRAVES,
Of Counsel.

George N. Taylor

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POINT II.

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Due process of law is denied by a State to a railroad or any other public service company seeking to contest the reasonableness of a legislative tariff of rates if a trial before a Court of Equity is denied. Only a Court of Equity is competent to meet such an emergency and determine once for all and without a multiplicity of suits, matters that affect not simply individuals but the interests of the entire community 42; 47

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It is not due process of law under the Fourteenth Amendment nor a judicial inquiry to empower a rate-making agency of a State to sit in judgment upon the reasonableness of its own legislative act. Though such agency may be denominated a "Court of record" or be given certain powers of a Court of record and although its procedure may

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partake of the semblance of judicial forms yet the procedure is not due process of law and is not judicial procedure where one party to a controversy is empowered to decide that controversy for itself and such a function is not within legislative authority because it is not the establishment of any rule of action or decision but is a placing of the other party so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of persons whose interest it will be to decide arbitrarily and unjustly. 37–38; 99–116

Hence the State Corporation Commission of Virginia is merely an administrative agency of that State and is not clothed with the judicial functions and machinery provided and approved by the wisdom of successive ages and which are characteristic of a court of justice proceeding according to the course of the Common Law and the course of Equity; and, therefore, it is in no sense a court. . . . 37–38; 99–116

The question of the unreasonableness of a rate prescribed by a rate regulating tribunal is a judicial question to be determined ultimately by the Courts, either State or Federal, if there is to be due process of law. This question cannot be so conclusively determined by the Legislature of a State or by regulations adopted by a State agency under its authority, as to make it unnecessary to due process of law that the question should become the subject of judicial inquiry 38, 79–83

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A notice and a hearing may both concur. They may each be required as a preliminary step to the act of making a rate and yet there may be no due process of law. The body before which the hearing upon notice occurs may, like the Virginia Corporation Commission for the reasons last above set forth be an invalid body by the law of its creation 38; 99 116

The proper and the only mode of judicial relief against a tariff of rates established by or enforceable by a commission is by a Bill in Chancery asserting its unreasonable character and its conflict with the Constitution of the United States. Only a Court of Equity is competent to meet such an emergency and determine once for all and without a multiplicity of suits matters that affect not simply individuals but the interests of the entire community 42 48

But no matter what may be the adequacy or the inadequacy of the original and appellate procedure under the Virginia Constitution, the principle frequently asserted by the Supreme Court of the United States here applies,—that the Equity jurisdiction of the Federal Courts cannot be impaired or diminished by the Statutes of the several States regulating the practice of their own Courts, even though a remedy is created by such Statutes which may be the full equivalent of the jurisdiction of the Federal Chancery 48–54

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(a) Where the power to establish rates is delegated to Administrative Officials such as a Railroad Commission, the functions of the Commission in considering what rates shall be prescribed by it to control in the future are legislative in character .. 71–79

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(b) After such rates have been determined upon the action of the State Corporation Commission looking to their enforcement is ministerial or administrative in character, is no longer legislative in character and is not judicial in character and is not the enforcement of any judicial judgment or decree of a court 79–92

The publication or announcement that a Railroad Rate has been established by a State Legislature or a State Railroad Commission is not part of the Act of Legislation but is an administrative Act and may be enjoined when the rate itself is unconstitutional 86–92

2. That the Virginia State Corporation Commission is not a Court within the purview of Section 720 of the Revised Statutes of the United States 93–99

3. That even if the act sought to be enjoined were judicial and not administrative, even if the Commission were a Court within the meaning of Section 720, the Commission by the law of its creation is not a valid constitutional body under the Constitution of the United States 99–116

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The State Corporation Commission of Virginia is not vested with the judicial attribute of impartiality 99–116

It is not clothed therefore with one of those essentials of a judicial tribunal which has been provided for and approved by the wisdom of successive ages 99–116

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It is therefore in no sense a court. It is merely an administrative agency of the state 99-116

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The case of Southern Railway Company, Appellee in No. 275 160

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

Robert R. Prentis et al., Appellants,
vs.
Atlantic Coast Line Railroad Company, Appellee.
No. 270

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No 273

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vs.
Norfolk and Western Railway Co., Appellee.
No. 274.

Robert R. Prentis et al., Appellants.
vs.
Southern Railway Company, Appellee.
No. 275.

SIX CASES.

SIX APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEES.

STATEMENT.

All of these cases involve the constitutionality of the action of the State Corporation Commission of Virginia in prescribing, by its order of April 27th, 1907, to go into effect July 1, 1907, a maximum passenger rate of 2 cents per mile to be put into effect and observed by the

Atlantic Coast Line Railway Company,
Chesapeake and Ohio Railway Company,
Louisville and Nashville Railroad Company,
Norfolk and Western Railway Company,
Southern Railway Company (except on 3 of its Divisions hereinafter mentioned) within the State of Virginia:

And a maximum passenger rate of 2½ cents per mile to be put into effect and observed by the Southern Railway Company on its Norfolk Division (in Virginia) and on its Franklin Branch and Claremont Branch within the State of Virginia:

And a maximum passenger rate of 3 cents per mile to be put into effect and observed by the

Chesapeake-Western Railway.

ACTION OF THE STATE CORPORATION COMMISSION:

As appears by each of the Transcripts of Records in these cases (Record No. 270, p. 5, No. 271 p. 53, No. 272, p. 4, No. 273 p. 6, No. 274 p. 6, No. 275, p. 5) the State Corporation Commission of Virginia, on the 31st day of July, 1906, gave a notice by publication, entitled "To the several Steam Railroad Companies doing business in Virginia and all persons interested" substantially to the effect that the State Corporation Commission would, on the first day of November, 1906, in accordance with the authority conferred by the Constitution of Virginia and the statutes enacted by the General Assembly of Virginia, hear and consider any objections which might be urged against a general rule, regulation, order or requirement of the Commission fixing and prescribing a maximum rate or charge of 2 cents per mile for the transportation of passengers on the line of any railroad company in the State operated by steam between points in Virginia. As a result of that notice a hearing took place on November 1, 1906, and the proceedings continued before the Commission until their final order of April 27th, 1907, which is set out in full in each of the Transcripts of Records in these cases, (Record No. 270 p. 6, No. 271 p. 12, No. 272 p. 5, No. 273 p. 7, No. 274 p. 7, No. 275 p. 6) was made,—the order from the enforcement of which the railroad companies desire relief.

For convenience in reference the Notice of July 31, 1906, and the order of April 27, 1907, are printed at length in the Appendix filed with this brief as well as the Con-

stitutional and General Statutory provisions of Virginia referred to in the Records of these cases or cited in the Briefs of Appellees.

The State Corporation Commission of Virginia was created and established and its functions, powers, duties and method of procedure were prescribed by Sections 155 and 156 of the Constitution of Virginia of 1902, and certain statutes of that State, copies of which are set out at length in each of the Transcripts of the Records in these cases as follows:

In Record of No. 270, pages 42 to 49, 83 to 115;
" " " No. 271, " 65 to 96;
" " " No. 272, " 41 to 72;
" " " No. 273, " 44 to 76;
" " " No. 274, " 71 to 78, 123 to 154;
" " " No. 275, " 55 to 62, 97 to 128.

and in the Appendix filed with this brief, pages 7-18.

SYNOPSIS OF PLEADINGS AND DECREE:

The bills of complaint against the members of the State Corporation Commission and the Clerk of the Commission the appellees (filed in the Court below at different dates in May, 1907, by all of these railroad companies) alleged, under the facts set forth therein, that the enforcement by the State Corporation Commission of its order of April 27th, 1907, would materially and unreasonably change and reduce the rates of toll (established by four if not by five of the complainants at not higher than 3 cents per mile and by the other complainant, the Chesapeake Western Railway, having a road of about 40 miles in length at not higher than 3½ cents per mile) and would thereby cause a loss of revenue to each complainant company and would deprive them of their property without due process of law and without just compensation and would deny to them the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States. (Record, No. 270 p. 2, No. 271 p. 2, No. 272 p. 2, No. 273 p. 2, No. 274 p. 2, No. 275 p. 2.)

The bills of complaint of three of these railroad companies,—the Chesapeake and Ohio Railway Company, the Norfolk and Western Railway Company, and the Southern Railway Company,—also alleged under the facts therein set forth that the action of the Commission under its order of April 27, 1907, impaired the obligation of their charter contracts with the State of Virginia in violation of their rights under the provision of the Constitution of the United States forbidding any State to pass any law impairing the obligation of contracts. (Record No. 271 p. 30, No. 274 p. 9, No. 275 p. 9.)

By these bills of complaint the Court below was invoked by the railroad companies, appellees, to protect them in their constitutional rights and to restrain the State Corporation Commission and the Clerk of the Commission from enforcing its order. On the filing of the bills and the filing of approved bonds, temporary restraining orders were granted and the hearing on motions to show cause why interlocutory injunctions should not be granted was fixed for and made returnable June 27th, 1907.

As the Record in each case discloses and as will hereafter more specifically appear, the demurrers to the Bills of Complaint were overruled and likewise all the pleas, and as the Bills were on final decree adjudged, sustained and taken for confessed upon defendants declining to answer, the remaining facts will best appear by the following synopsis of the Bills of Complaint which therefore are respectively a statement of each case.

The bills of complaint in three cases—the cases of Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company and Southern Railway Company allege in substance that the Complainants the Appellees are corporations created under the laws of Virginia, and that under their charters and authority from other States they have acquired and are operating continuous lines of railroad extending through various States in this Union; that they are common carriers of freight and passengers, and are, and have been since their organization, engaged in both intra and interstate com-

merce in Virginia and the other States through which their lines extend; that, pursuant to the provisions of their Virginia charters, the above three transportation companies have the right to charge for the transportation of a person and his baggage (not exceeding 150 pounds) wholly within the State of Virginia not exceeding 6 cents per mile, and for the transportation of any person for a distance of less than ten miles a charge may be made at the foregoing rate as for ten miles, and that if for the transportation of any person with his baggage the whole charge would be less than 25 cents the same may nevertheless be charged as a minimum; that their charters provided that the same may be altered or modified by any future Legislature as may to it seem proper,

> "*Except that no law shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent in any other cases than such as are specially provided for in this chapter.*"
>
> (See also Appendix filed with this Brief, pages 65, 67, 69, 71 and 73.)

and that this specific exception declares that when their net profits shall be such that dividends might be declared out of said profits exceeding the rate of 15 per centum per annum on the capital stock invested, laws may be passed reducing the tolls of the company, but no law shall reduce the tolls so as to prevent dividends of 15 per centum per annum within thirty years from the time the first dividend of profits was declared, or so as to prevent dividends of 12 per centum per annum after the said thirty years and before fifty years from the same time, or so as to prevent dividends of 10 per centum per annum after the said fifty years; and that their net profits have never been such that dividends might have been declared out of said profits exceeding the rate of 15, 12 or 10 per centum. That their charters constitute contracts between the said State of Virginia and the complainants (to wit, Chesapeake and

Ohio Railway Company, Norfolk and Western Railway Company, and Southern Railway Company) upon which the said complainants, in accepting their respective charters and in acquiring their properties, relied in full faith, as did also the purchasers of their stock and bonds; and thereby secured to the complainants as a contractual right the right to charge, receive and collect their tolls as fixed and established prior to the said order of the said State Corporation Commission of Virginia, the same being lower than the rates to which they are entitled by their contracts with the State as above set forth, and complainants deny that any of the events have happened which satisfy the condition precedent to the exercise of any right on the part of the State of Virginia to change the tolls of these complainants without their assent; that nevertheless, notwithstanding the protection of paragraph one, Section 10, Article I, of the Constitution of the United States, which provides that no State shall pass a law impairing the obligation of contracts, said State Corporation Commission of Virginia reduced their tolls for intrastate travel in Virginia as above stated without the assent of the complainants and complainants submit that said paragraph one of Section 10 of Article I, of the Constitution of the United States limits the power of the State (not only in its Legislature, but also in Constitutional Convention assembled), that no action of the people of Virginia, either in Convention or Legislature assembled, can impair the obligation of the contracts existing between the State of Virginia and the complainants, and *a fortiori*, neither the State Corporation Commission of Virginia nor any other governmental agency of said State, can impair the obligation of said contract.

All of the appellees in their Bills of Complaint allege in substance that on the 27th day of April, 1907, the State Corporation Commission of Virginia promulgated an order whereby it required the following named Appellees,—Norfolk and Western Railway Company, Chesapeake and Ohio Railway Company, Atlantic Coast Line

Railroad Company, Southern Railway Company (except as to three divisions, aggregating 287 miles) and Louisville and Nashville Railroad Company—to put into effect and observe a maximum rate of 2 cents per mile in the intrastate transportation of passengers in Virginia; And that in the same order the said Commission required the appellee, Southern Railway Company upon its three above mentioned divisions to put into effect a maximum rate of 2½ cents per mile; and that in the same order the said Commission required the appellee, Chesapeake Western Railway to put into effect upon its entire line of about forty miles, a maximum rate of 3 cents a mile; that the effect of the enforcement of the said order is to materially and greatly change and reduce the rates of toll established by the complainants now in effect,—and thereby to cause a loss of revenue to each company of a large sum of money per annum; and that it will not be possible for the appellees in the operations of their lines in Virginia, to reimburse themselves for such loss, because the effect of such reduction of rates will not be to increase the amount of passenger business of any of the appellees and each Bill sets forth with particularity the loss in dollars and cents, that would be sustained by each Company by the enforcement of the order of the Commission.

All the appellees, the complainants also allege in their bills of complaint,

First. That Sections 155 and 156 of the Constitution of Virginia and the various acts of the Legislature of Virginia subsequently enacted pursuant thereto, under which the State Corporation Commission of Virginia is organized, do not and cannot constitute or afford due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, in this, that there is by said Constitution and Statutes of Virginia conferred upon the said Commission administrative, executive, legislative and judicial powers and functions in respect to the same subject matter, and, in addition to not con-

stituting due process of law, do not afford to the complainants the equal protection of the laws within the meaning of the Fourteenth Amendment in this: that while for the protection of every other interest in Virginia a judicial tribunal is provided by the Constitution and laws of the State which is not clothed with legislative and executive functions with respect to matters in which it is required to exercise judicial functions, this protection is denied to the complainants and all other transportation and transmission companies in respect to their public duties; that such excessive, extreme and cumulative fines and penalties are provided as to deter the complainants from the effort to have legally and judicially determined the validity of the orders of said Commission, and that the complainants are under the duress of submitting to orders which courts may hold invalid rather than take the chance of such excessive fines and penalties; and that the terms upon which the complainants may enter the courts are so unequal as compared with other suitors that thereby the complainants are denied the equal protection of the laws guaranteed them by the Constitution of the United States.

Second. That the said order of the Corporation Commission fixing and prescribing the maximum rate of 2 cents and of 2½ cents and of 3 cents per mile, as is above set forth more specifically for the transportation of passengers would, if enforced, be confiscatory of the property of the appellees and would not afford them reasonable and just returns on the values of their respective properties, whether the State assessment for taxation, the cost of reproduction, or the commercial value be considered, the latter two values being greater than the tax valuation, that said rate reduces the earnings of all of said six appellees below what reasonable passenger rates, fares and charges would produce, would deprive all the six appellees of their property without just compensation, would not afford them due process of law, and would deny to them the equal protection of the laws; and all the six appellees submit figures substantiating their contention.

Third. That their present passenger rates, fares and charges are not higher than 3 cents per mile in the case of four if not of five of the appellees, and in the case of the Chesapeake Western Railway not higher than 3½ cents per mile, that the said rates established by appellees and in effect at the date of said order of the Commission, are not higher than is just and reasonable, whether considered in respect to the value of the property used in the public service or in respect to the value of the service rendered to the passengers, and appellees claim as an incident to their property, and as a property right, the right to charge for each service which they render a reasonable compensation, and that they are protected in this right by the Fourteenth Amendment to the Constitution of the United States, inasmuch as to prevent them from charging such reasonable compensation would be to deprive them of their property without just compensation and without due process of law, and deny to them the equal protection of the laws.

Fourth. That the said order of the State Corporation Commission of Virginia of April 27th 1907 is within the inhibition of paragraph three, Section 8, Article I. of the Constitution of the United States, conferring upon Congress alone the power to regulate commerce between the States, in this, that the effect of the said 2 cent, 2½ cent and of the 3 cent per mile maximum rate, as is above set forth more specifically, is to destroy the proper adjustment of the intrastate rates of the complainants in Virginia to their interstate rates generally, and to require that a preference should be given by the complainants and an undue discrimination exercised by them in favor of the intrastate passenger traffic in Virginia over the interstate passenger traffic carried by the complainants in Virginia and other States and over their intrastate passenger traffic in other States; and that especially is said order establishing said maximum in conflict with the Act of Congress entitled "An Act to Regulate Commerce," as the same has been amended by the Act of June 29, 1906, in this, to-wit, that the application of the said order of the Commission fixing

and prescribing a maximum rate of 2 cents, 2½ cents and of 3 cents per mile as is above set forth more specifically necessarily disturbs the interstate rates now established and in effect by their interstate passenger tariffs on file with the Interstate Commerce Commission, as required by the Act to Regulate Commerce and enables interstate passengers, at their pleasure, to obtain interstate transportation from the complainants, at a compensation less than and different from the lawful rates, fares and charges filed and published in accordance with said Act; and that the complainants are powerless to prevent the further loss of revenue, and also to prevent the infraction of the laws of the United States in the premises by transporting interstate passengers at a less or different compensation than the rates, fares and charges specified in said tariffs so filed and published, so that the said order of the said State Corporation Commission of Virginia clearly and directly affects and regulates the interstate commerce of the complainants as well as their intrastate commerce in Virginia.

Fifth.—That they are entitled to the equitable intervention of this court in order to prevent a great multiplicity of suits and proceedings being brought against them, averring that in the course of the operation of their lines of railway in Virginia they receive and carry every day between points, both of which are within the State of Virginia, many hundreds of passengers; that by the terms of the said order of the State Corporation Commission the complainants are restricted to the maximum of 2 cents, 2½ cents and 3 cents per mile as is above set forth more specifically, and that complainants must either accept this rate without protest or act at their peril if they dare to charge a higher rate; that the pendency of such complaints, actions, suits and proceedings, aggregating such enormous amounts, would have the tendency to depreciate the value of complainants' properties, stock and bonds, and would inflict great injury and damage upon the stockholders and bondholders of complainants, and that the complainants are entitled to

the equitable intervention of this court, in which, by one orderly proceeding, all of the matters above referred to may be judicially determined.

Sixth.—That the amount involved in each case exclusive of interest and costs exceeds the sum or value of $2000—and that they have no adequate remedy at law and would be irremediably injured unless the injunction as prayed for in the bills be granted and the relief in said bills asked for be given.

The members of the State Corporation Commission, and the Clerk of the Commission by their joint and separate answer (the same in all the cases) to the notice of the hearing fixed for and made returnable June 27, 1907, on motion to show cause why interlocutory injunctions be not awarded, challenged the jurisdiction of the court below on the grounds substantially:

1. That the bills of complaint filed were in effect suits against the State of Virginia;

2. That the Court below had no power to stay the action of the State Corporation Commission, as the Commission is a court;

3. That the action taken by the State Corporation Commission was conclusive, and the validity or justness of its order could not be inquired into by the court below.

(Record No. 270, page 67; No. 271, page 49; No. 272, page 25; No. 273, page 28; No. 274, page 107; No. 275, page 81.)

The cases on the motions to show cause why interlocutory injunctions be not awarded having been fully argued on behalf of the railroad companies and on behalf of the State Corporation Commission, decrees awarding interlocutory injunctions against the appellants as individuals and as constituting the State Corporation Commission and against the clerk thereof were entered July 10, 1907, and the required bonds having been approved and filed, writs of injunction were issued.

(Record, No. 270, page 173; No. 271, page 156; No. 272, page 140; No. 273, page 132; No. 274, page 217; No. 275, page 188.)

Subsequently, on August 5, 1907, in each case, R. R. Prentis, one member of the Commission filed a demurrer to the bills of complaint, and the other members of the Commission and the Clerk of the Commission filed a joint and separate plea. And on September 15, 1907, all of the members of the Commission and the Clerk of the Commission by leave of court filed a joint and several plea of *res adjudicata.*

The demurrer of R. R. Prentis set up the following grounds of demurrer in each of the cases:

> "*First.*—That the said plaintiff has not, in and by the said bill, made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for;
>
> *Second.*—That this defendant has no personal or individual interest in the matters and things referred to in said bill;
>
> *Third.*—That the said plaintiff has an adequate remedy at law;
>
> *Fourth.*—That the matters and things complained of in said bill are *res adjudicata;*
>
> *Fifth.*—That this court has no jurisdiction to hear and determine this cause, for the reason that this is a suit against the State of Virginia;
>
> *Sixth.*—That this court has no jurisdiction to hear and determine this cause, for the reason that the State Corporation Commission is a 'court' of the State of Virginia, and this court is therefore without power to enjoin the said Commission;
>
> *Seventh.*—That this court has no jurisdiction to hear and determine this cause, for the reason that, if said Commission is not such a 'court' as this court is without power to enjoin, then the publication of said Commission's order of April 27th, 1907, was a necessary part of the enactment of the same as legislation, and this court is equally without power to enjoin legislation before it is enacted."

(Record No. 270, page 180; No. 271, page 162; No. 272, page 146; No. 273, page 138; No. 274, page 223; No. 275, page 194.)

The joint and separate plea of the other members of the Commission and of the Clerk of the Commission, the same in all the cases, set up practically the same grounds as are contained in the demurrer of R. R. Prentis (Record No. 270, page 181; Record No. 271, page 164; Record No. 272, page 146; Record No. 273, page 140; Record No. 274, page 224; Record No. 275, page 196) and the joint and several plea of *res adjudicata* of all the members of the Commission and of the Clerk of the Commission, the same in all the cases, set up practically the same ground as is contained in the fourth ground of the demurrer of R. R. Prentis. (Record No. 270, page 191; No. 271, page 173; No. 272, page 152; No. 273, page 144; No. 274, page 234; No. 275, page 205.)

The demurrers and pleas having been set down for argument, the court being of the opinion that the demurrers were not well founded in law, the same were on December 26, 1907, decreed overruled, and the Court being of the opinion that the pleas were not sufficient in law the same were on the same date decreed overruled as not good in law.

Each of the parties defendant in the Bills of Complaint standing upon their respective demurrers and pleas and upon the joint and separate answer of the defendants to the rule returnable June 27th, 1907, and each and all of them declining to answer the bills of complaint, the Court by its final Decrees entered on Dec. 26, 1907 in all the cases adjudged that the bills of complaint were sustained and taken for confessed; and the Court,

> "being of opinion that the order of the State Corporation Commission of Virginia of the 27th day of April, 1907, complained of in the Bill, violates the rights of the Complainant under the Constitution of the United States, and is in contravention thereof, as alleged in the bill, and that accordingly the Complainant is entitled to the relief prayed for in said Bill, as set forth therein, doth so adjudge, order and decree, and doth further adjudge, order and decree

that the interlocutory injunction awarded in this cause on the 10th day of July, 1907, be, and the same is, hereby made perpetual."

These words are quoted from the final decrees in Cases Nos. 270, 271, 274 and 275. The language in the final decrees in Cases Nos. 272 and 273 is somewhat different, but the final decrees in all cases are substantially the same. (Record No. 270, page 195; No. 271, page 177; No. 272, page 156; No. 273, page 148; No. 274, page 238; No. 275, page 209.)

And injunctions were accordingly issued against the defendants constituting the State Corporation Commission restraining them from publishing the order of the Commission of April 27, 1907, and from otherwise enforcing the requirements of the order of the Commission of April 27, 1907, and also against the Clerk of the Commission and the proprietors of newspapers published in Richmond, Virginia, from publishing the order of the Commission as to the above-named six railroad companies.

Special Facts Showing Deprivation of Property of Appellees.

The special facts showing deprivation of property of appellees will best appear by a synopsis of certain parts of the several bills of complaint.

These special facts, including figures as to income and cost of operation, etc., are printed at the conclusion of this brief. (See page 123.) The special facts stated in detail and disclosed in the several bills of complaint show that the order of the Virginia State Corporation Commission fixing and prescribing the maximum rate to be charged by each appellee per mile for the transportation of passengers is unreasonable and unjust, is confiscatory, reduces its earnings below what reasonable passenger rates, fares and charges would produce, deprives the Appellees of their property without just compensation and each Appellee submits figures substantiating its contention.

The conclusions which, on the demurrer and the pleas, must be regarded as established by these special facts are, that the rate fixed by the Commission operates upon the business of

The Atlantic Coast Line Railroad Company to reduce its total net earnings from intrastate traffic in Virginia from $47,014.27 to $30,184.27, and that this will leave a deficiency of $9,379.28 on the annual interest charges applicable to Virginia upon its bonded indebtedness and leave no return whatever upon the stock (Record in No. 270, page 13) (page 123 of this brief);

The Chesapeake and Ohio Railway Company to reduce its net earnings from intrastate traffic in Virginia from $353,790.26 to $215,472.49 (Record No. 271, p. 19, p. 130 of this brief), so that its earnings will not be sufficient to pay the interest on that portion of its bonded indebtedness, trackage and rental charges applicable to Virginia by the sum of $121,580.15, giving no return whatever upon the stock. (Record No. 271, page 21; page 130 of this brief);

The Chesapeake Western Railway to reduce its net earnings from intrastate business from about $13,613.30 to $10,601.30, leaving a deficit of $46,158.70 on the annual interest charges of the bonded indebtedness and leaving nothing for dividends. (Record No. 272, page 8; page 139 of this Brief);

The Louisville and Nashville Railroad Company to reduce its total net earnings from all intrastate business (both freight and passenger) from $14,652.65 to nothing whatever and to cause a deficit on its instrastate business in Virginia in operating expenses of $3,242.11 (Record No. 273, page 13; page 143 of this brief);

The Norfolk and Western Railway Company to reduce its net earnings from intrastate passenger traffic in Virginia from $413,797.02 to $73,918.74 (reducing the return from its intrastate passenger business in Virginia to 1 and 8/100 of 1 per cent upon its capital devoted to that business) which sum would have been insufficient to discharge the proper proportion of the annual interest on the bonded indebtedness and would yield no return

whatever upon the stock. (Record No. 274, page 17; page 150 of this Brief);

Southern Railway Company to reduce its intrastate revenue in Virginia annually to the extent of about $190,000, leaving less than $8,000 as annual net intrastate earnings in that State. The commercial value of the property and its cost of reproduction are each greater than the valuation put upon such property by the State for purposes of taxation, but even upon the proportion of such taxation value that is used in producing revenue from intrastate traffic in Virginia (such proportion being the same percentage of the total tax valuation as the gross intrastate earnings bear to the total gross earnings in the State), the annual net earnings from such intrastate traffic would, under the proposed rates, amount only to about 10/100 of one per cent, before allowing anything for the payment of interest or dividends. Also: If instead of taking the above proportion of the total tax value, only that proportion of the assessed value of the *physical* properties of the company be used as a basis, the annual net earnings from intrastate traffic in Virginia would amount to only 23/100 of one per cent, leaving nothing for the payment of interest or dividends. Also: The proportion of annual interest upon the bonded indebtedness of the company, and upon the amount paid annually for trackage rentals in the State, which is properly chargeable to intrastate business, amounts to almost $520,000, while, as stated, the total net earnings from intrastate traffic annually amount to less than $8,000, leaving an annual deficit of about $512,000, after paying the amount of such interest and rentals properly apportionable to intrastate traffic in Virginia. (Record No. 275, page 11; page 160 of this Brief.)

The defendants in the court below, having filed petitions for appeal to this court and assignments of error, decrees allowing appeals were entered. Appeal bonds having been executed and approved the records in all these cases were certified to this court.

The assignments of error filed with and accompanying

the petitions for appeal are the same in all the cases and are as follows:—

"*First.*—That the court erred in assuming, asserting and retaining jurisdiction of said defendants, and of said cause.

Second.—That the court erred in not sustaining the validity of the several constitutional and statutory provisions of the laws of Virginia, creating the State Corporation Commission of Virginia, and prescribing its powers and modes of procedure, which said provisions are set forth in the record of said cause, and which were, by the complainant in said cause, 'claimed to be in contravention of the Constitution of the United States.'

Third.—That the court erred in finding and adjudging that the 'law' of the Commonwealth of Virginia, embodied in and created by the order of the State Corporation Commission of Virginia, dated April 27th, 1907, and set forth in the record of said cause, was, as 'claimed to be,' by the complainant in said cause, 'in contravention of the Constitution of the United States.'

Fourth.—That the court erred in overruling the demurrer to the bill in said cause.

Fifth.—That the court erred in overruling the joint and separate plea filed by three of the defendants in said cause on August 5th, 1907.

Sixth.—That, if the court had jurisdiction of said cause, and of said defendants, then it erred in overruling the plea of *Res Adjudicata* filed by the defendants in said cause.

Seventh.—That the court erred in not making, rendering and entering a decree in favor of the said defendants, and against the said complainant.

The foregoing specific assignments of error cover, as it is believed, the requirements of the Rule under which they are filed; but the said defendants, as Appellants, by their counsel, in view of the importance of this cause and the wide range of subjects necessarily involved in its proper consideration and determination, will pray the Honorable, the Supreme

Court of the United States, for leave to discuss, at the hearing, all the subjects involved in said appeal, and not to confine them to the specific points designated above."

(Record No. 270, p. 199; No. 271, p. 182; No. 272, p. 160; No. 273, p. 153; No. 274, p. 242; No. 275, p. 213.)

ARGUMENT.

Under the assignments of error to the action of the Court below in overruling the demurrers and the pleas, and in adjudging that the Bills of Complaint were sustained and taken for confessed, the defendants in the Court below declining to answer the Bills of Complaint, the general question now before this Court in these cases must be whether under the Constitutional provisions and legislation of Virginia creating the State Corporation Commission a method has been successfully devised whereby a state by its action, and by its action alone, may paralyze and destroy the equitable jurisdiction of the Circuit Courts of the United States under the Constitution and laws of the United States to protect the rights of complainants under the Constitution and laws of the United States.

The Railroad Companies appellees join issue on this question, and maintain that:

1. The bills of complaint set forth a case of impending deprivation of property in violation of the Fourteenth Amendment and of impending violation of a charter contract.

2. That an injunction will lie against State officers attempting to violate the Fourteenth Amendment, or attempting to take action under a State Law impairing

the obligation of a contract regardless of their personal interest in the proposed deprivation.

3. That there is no adequate remedy at law.

4. That the order fixing the objectionable rates is not *res adjudicata* because it is neither a judgment or decree of a Court of Virginia, nor is it a judicial act, but it is a completed legislative or *quasi* legislative act, of the rate-making agency of the State of Virginia; and this suit is brought only to enjoin the enforcement of that order.

5. That the present suit is not against the State of Virginia as the State itself is neither a party to this suit nor in any way interested in the establishment of the controverted rate.

6. That the Virginia State Corporation Commission when engaged in the act of rate making and when about to engage in the act of rate enforcement is not a Court of Virginia within the prohibition against federal injunctions contained in Revised Statutes of the United States, Section 720.

7. That the publication of the rates is a ministerial and not a legislative act.

The facts admitted of Record show that the rates prescribed by the State Corporation Commission by its order of April 27, 1907, to be put into effect by the appellees were confiscatory in violation of the rights of all the appellees under the 14th Amendment of the Constitution of the United States.

(Record No. 270 p. 9 to 15; No. 271, p. 18 to 22; No. 272, p. 7 to 10; No. 273, p. 10 to 15; No. 274, p. 12 to 17; No. 275, p. 11 to 17.) (See also "Special facts showing deprivation of property of appellees as will appear by the following synopsis of certain parts of several bills of complaint," printed at the conclusion of this brief, page 123.)

The allegations in the Bills of Complaint of three of the appellees—the Chesapeake and Ohio Railway, the Norfolk and Western Railway Company and the Southern Railway Company—under the facts alleged in connection therewith and admitted of record show that the rates prescribed by the State Corporation Commission by its order of April 27th, 1907, to be put into effect by those three Companies impaired the obligation of their Charter Contracts with the State of Virginia in violation of their rights under the provisions of the Constitution of the United States forbidding any State to pass any law impairing the obligation of contracts.

(Record, No. 271, p. 30; No. 274, p. 9; No. 275, p. 9.)

This Court has settled we believe beyond all question that under the facts alleged in these Bills the Court below had jurisdiction to grant an injunction to prevent the enforcement of the order of the State Corporation Commission of April 27, 1907, as its enforcement would have put into effect

(*a*) Confiscatory rates in violation of the rights of all the Appellees under the 14th Amendment of the Constitution of the United States;

Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418 (1890);

Reagan *v.* Trust Co., 154 U. S. 362 (1894);

Smythe *v.* Ames, 169 U. S. 466 (1898), affirming Ames *v.* Union Pac. Ry., 64 Fed. 165 (1894);

Cotting *v.* Godard, 183 U. S. 79 (1901);

Chicago M. & St. P. Ry. *v.* Smith, 110 Fed. 473 (1901), following the decision of this court in

Chicago, Milwaukee &c. Ry. *v.* Tompkins, 176 U. S. 174 (1900);

Northern Pacific Railway *v.* Keyes, 91 Fed. 47 (1898);

Chicago & N. W. R. R. *v.* Dey, 35 Fed. 866 (1888);

Ex parte Young, 209 U. S., 123;

Hunter *v.* Wood, 209 U. S. 205;

Southern Pacific R. R. Co. *v.* Board of R. R. Com'rs., 78 Fed. 236 (1896).

(*b*) and rates impairing the obligation of the charter contracts as to rates with the State of Virginia of three of the appellees in violation of their rights under the provision of the Constitution of the United States forbidding any State to pass any law impairing the obligation of contracts.

City Railway Co. *v.* Citizens Ry. Co., 166 U. S. 557 (1897);
Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1 (1898);
Detroit *vs.* Detroit Citizens Ry., 184 U. S. 368 ( ).

We believe that the principles laid down in the cases above cited are applicable to the cases now before this Court, and that it is not within the power of any state to create any tribunal such as the State Corporation Commission of Virginia or any other tribunal, under any machinery however elaborate and ingenious, which will in its effect deprive any one of rights granted under the Constitution and laws of the United States and preclude the Circuit Court of the United States from the exercise of its equitable jurisdiction and powers under the Constitution and laws of the United States, to protect any one against the action of such tribunal involving the denial or impairment of rights protected by the Constitution of the United States.

The assignments of error filed by appellants being all of a general character, the appellees consider that these cases now before this Court can be further and most satisfactorily and clearly presented to the Court by continuing the argument upon the lines set forth in the analysis prefixed to this brief.

POINT I.

The bills of the six appellees show in each case a right to equitable relief in the court below against the threatened invasion of a right or rights secured by the Constitution of the United States.

It is an established principle of Federal Constitutional Law and Federal Equity that a Federal Court may enjoin the enforcement by a State Railroad Commission of a rate which either works a deprivation of Railroad property in violation of the 14th Amendment to the Constitution of the United States or which violates a contract made between a Railroad Company and a State as to Railroad Rates, or any provision of the Constitution of the United States. The Ministerial Acts of State officers in enforcing such a rate have therefore been enjoined frequently by the Federal Courts.

[Answering the first ground of Demurrer, that the said plaintiff has not, in and by the said bill, made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for.]

THE BILLS ON THEIR FACE SHOW EQUITY, AND FEDERAL JURISDICTION.

The Bills of Complaint distinctly and with requisite certainty set forth cases demanding the equitable relief prayed for. The averments of the Bills show a threatened deprivation of the property of Complainants and a threatened impairment of the obligation of their Charter Contracts in violation of Complainants' rights protected by the Constitution of the United States and that there is no adequate remedy at law in that the injury threatened if submitted to would work an irreparable loss and if not submitted to would lead to a multiplicity of litigation.

The jurisdiction of the Circuit Court sitting in Equity to entertain these Bills of Complaint rests upon the Statutes of the United States as follows:

"Revised Statutes Sec. 629, Clause 16, providing: The Circuit Courts shall have original jurisdiction as follows:—

"*Sixteenth.*—Of all suits authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any State of any right, privilege or immunity, secured by the Constitution of the United States or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

and the further statute (Act of Aug. 13, 1888) providing as follows:—

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States &c. &c." (25 Statutes at Large p. 434).

This court in *Ex parte* Young 209 U. S. 123 (1908) has again emphatically stated that although no diversity of citizenship exists, no diversity of citizenship is necessary to give jurisdiction but that

If "the acts of the legislature and the orders of the railroad Commission, if enforced, would take property without due process of law, and although that question might incidentally involve a question of fact, its solution nevertheless is one which raises a Federal question. * * * The sufficiency of rates with reference to the Federal Constitution is a judicial question, and one over which Federal Courts have jurisdiction by reason of its Federal nature."

POINT II.

No individual interest of any of the defendant members of the State of Corporation Commission Virginia is necessary to give jurisdiction.

[Answering the second ground of the demurrer to the effect,

That this defendant has no personal or individual interest in the matters and things referred to in said bill.]

In Smyth *v.* Ames 169 U. S. 466 (1898) Mr. Justice Harlan said (pp. 518-519):—

> "It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the State within the meaning of that Amendment."

In Fitts *v.* McGhee, 172 U. S. 516 (1899) this Court quoting with approval the language of the Court in *In re* Ayers, 123 U. S. 506, said:—

> "But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who under color of the authority of unconstitutional legislation by the State are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by inquisition or mandamus where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

In Prout *v.* Starr, 188 U. S. p. 544 (1903) this Court said in a case where a new attorney general, Prout, had been

appointed after the original decree against Attorney General Smyth had been rendered in Smyth *v.* Ames:—

> "It is further argued by the appellant, as one of the grounds of his demurrer, that he was complained against in his official capacity as attorney general of the State of Nebraska, and not in his individual capacity as a citizen thereof, and that the attorney general of a State cannot be restrained by an injunction of a United States court from enforcing the criminal laws of the State.
>
> This, we think, is only another phase of the same question. It is true that the defendant was included in the bill as the attorney general of the State, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act."

In Reagan *v.* Trust Co., 154 U. S. 362, 389, Mr. Justice Brewer repeated with approval the following language of Mr. Justice Woods in Cunningham *v.* Macon, &c., R. R. 109 U. S., p. 452 (1883):—

> "In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him."

The decision of the recent case of *Ex parte* Young, 209 U. S., 123 (1908) wherein a committal for contempt in violating a Circuit Court's injunction was sustained by this court against the Attorney-General of Minnesota sufficiently disposes of the defendant's contention under the second ground of demurrer.

POINT III.

The Railroad Companies of Virginia have no adequate remedy at law in the premises provided by the Constitution and Laws of Virginia.

The adequacy or inadequacy of a remedy at law for the protection of rights of one entitled, upon any ground, to invoke the powers of a Federal Court, is not to be conclusively determined by the Statutes of the State in which the suit is brought. One entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State Court on the same cause of action. A state cannot tie up any one having the right to invoke the power of a Federal Circuit Court by limiting the plaintiff to suits for redress in its own courts.

[Answering the third ground of the demurrer—"that the said plaintiff has an adequate remedy at law."]

As a preliminary to the discussion of this ground of demurrer we would call attention to the numerous decisions of this court explaining the meaning of the rule that recourse to equity is forbidden when there is an adequate remedy at law. Those decisions are explicit that the rule applies only where the remedy at law is as practical and as efficient as the remedy afforded by Equity.

> "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as

> practical and efficient to the ends of justice and its prompt administration as the remedy in equity."
>
> Boyce's Executors *v.* Grundy, 3 Pet. (U. S.) 210, 215 (1830).

> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances."
>
> Gormley *v.* Clark, 134 U. S. 338, 349 (1887).

See to the same effect Kilbourn *v.* Sunderland, 130 U. S. 514, (1889), wherein Mr. Chief Justice Fuller said:

> "The jurisdiction in Equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which Equity would confer under the same circumstances."

Said Mr. Justice Brown, (speaking for the Supreme Court of the United States in Walla Walla *vs.* Walla Walla Water Co., 172 U. S. at page 12:—

> "This Court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at Equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in Equity. Boyce's Executors *vs.* Grundy, 3 Pet, 210, 215; Ins. Company *vs.* Bailey, 13 Wall., 616, 621; Kilbourn *vs.* Sunderland, 130 U. S., 505, 514; Tyler *vs.* Savage 143 U. S., 79, 95."

In the Federal Courts the test of the adequacy of the legal remedy is the remedy at law existing at the passage of the Judiciary Act of 1789 or its amendments.

In McConihay *v.* Wright, 121 U. S., 206 (1887), this Court said:

> "The adequate remedy at law, which is the test of Equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Act of Congress."

That the rule denying equitable jurisdiction where there is an adequate legal remedy has no application will appear from the following

FACTS SHOWING THAT THE RAILROAD COMPANIES OF VIRGINIA HAVE UNDER THE CONSTITUTION AND LAWS OF VIRGINIA NO ADEQUATE REMEDY AT LAW TO CONTEST A CONFISCATORY RATE.

The procedure prescribed by the Constitution of Virginia and to be pursued by any railroad seeking to contest any rate made by the Virginia State Corporation Commission as confiscatory or as in violation of Constitutional rights may be thus summarized:

1. The State Corporation Commission of Virginia having established certain rates has the power to put these rates immediately into force and to punish every violation thereof by imposing a fine of $500.00 per day. See Constitution of Virginia, latter part of Sec. 156 (c) (Appendix to Appellee's Brief, p. 13.)

2. The Corporation Commission has no jurisdiction upon the petition of a railroad to prevent a multiplicity of litigation by restraining passengers from bringing actions at law for violations of a rate complained of by the railroad, as confiscatory. Pending the inquiry and ultimate decision of the disputed questions of law and fact by the judicial department of the State, nothing can be done by the Virginia State Corporation Commission to preserve the *status quo* and thus prevent the irremediable loss of income from obeying a statute which might prove unconstitutional or on the other hand the irremediable injury of being exposed to a multiplicity of litigations by violating it.

Multiplicity of litigations commenced by passengers pending an appeal could not be prevented by the Virginia Corportation Commission or by the Supreme Court of Appeals of Virginia.

Even a *supersedeas* upon an appeal does not prevent a multiplicity of litigation. In the Constitution of Virginia, Sec. 156 *(h)* (Appendix, p. 17), is found the following provision:

> "But in no such proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the commission within the scope of its authority, and then in force, be questioned; *provided, however*, that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof."

While any one may institute an action against the Railroad growing out of an order of the State Corporation Commission, the Railroad Company in such proceeding, or in any collateral proceeding is deprived of the right to question the rate prescribed by the Commission. (See Constitution of Virginia latter part of 156 *(h)*); (Appendix, p. 17.)

In other words, Railroad Companies are not protected from a multiplicity of suits even by the remedy of an appeal to the Court of Appeals of Virginia; nor are they protected from the necessity of making defence to those suits. They are only given by the constitution the benefit of a plea that will not of course prevent the suit, but will simply stay the trial of it until the Court of Appeals passes on the appeal which has been pre-

sented. They will be sued, or can be sued, by tens of thousands of people. They will be required to go into tens of thousands of suits and file their plea of the pendency of an appeal and of the *supersedeas* in order that they may stay the proceedings in tens of thousands of suits. The constitution expressly provides that the course of those suits can only be stayed upon the objection of either party. The affirmative action must be taken by the Railroad Companies of going into every one of these suits and pleading the pendency of the appeal and an objection to the hearing, before it can be stayed. The rule of the equity jurisprudence is not against the trial of a multiplicity of suits—*it is against being vexed with a multiplicity of suits.*

Mr. Justice Brewer, when Circuit Judge, in Chicago &c. R. R. Co. *v.* Dey, 35 Fed. 866 (1888)), said:

> "Equity interferes to prevent a multiplicity of suits, and where one act may be the foundation of many suits, Courts have a right and it is their duty in the first instance, to stay that act if unlawful."

And the Appellees have to go part of the way through the trial of the suit even under the remedy of appeal to the Supreme Court of Appeals of Virginia. They have to go into every community through which their roads run, into every justice's court, into every *nisi prius* court, and make their defence up to the point of pleading and objecting to the continuance of the suit. The Appellees therefore have the evil of this multiplicity of suits even under the remedy of appeal and of the *supersedeas.*

The kind of actions that may be brought against the Railroad Companies are provided for under clause 3 of an Act of the Legislature of Virginia approved January 18, 1904.

> "If the railroad company shall, after payment or tender of the lawful tolls or charges, fail, or refuse to receive or to transport, or to deliver in a reasonable time, any property so delivered or offered, or fail to take up or set down any passenger at such

depot or other regular stopping place of a train scheduled to stop at such depot or place, as he may desire, or if the said company shall demand or receive more than is lawful, it shall forfeit to the injured party a sum, to be recovered by motion or action, of not less than twenty-five nor more than one hundred dollars." (Appendix to Brief p. 59.)

So that every patron of Railroad Companies to whom they may charge what they are entitled to charge under the Constitution of the United States, that is to say, a reasonable rate, if it differs from the rate mentioned in an order of the Commission, may by motion or action in any court of Virginia bring his suit against them.

3. The Constitution of Virginia expressly denies to the Railroad Companies that remedy which the Supreme Court of the United States has declared to be the only appropriate remedy to question the illegality of a rate prescribed by a railroad commission—a bill in equity. There is no equity jurisdiction left in Virginia to prevent irreparable injury to the railroads pending the investigation of a rate. (Constitution of Virginia, latter part of Sec. 156 (d); Appendix, p. 17.)

Hence the railroads are deprived of their property without due process of law.

4. The anomalous provision exists in the Constitution of Virginia that the body appealed from—the State Corporation Commission, the Appellees—may impose conditions whereby the supersedeas of the Appellate Court shall be defeated. (Constitution of Virginia, 156-c. Appendix, p. 14, 15.)

Notwithstanding the right of appeal to the Supreme Court of Appeals, and even after an appeal has been granted, "pending the appeal and notwithstanding any *supersedeas*," the Commission "shall forthwith require the appealing company, under penalty of the immediate enforcement of the order or requirement appealed from,

to keep such accounts and to make to the Commission from time to time such reports, verified by oath, *as may, in the judgment of the Commission,* suffice to show the amounts being charged or received by this Company, pending the appeal in excess of the charge allowed by the action of the Commission appealed from, together *with the names and addresses of the persons* to whom such overcharges will be refundable in case the charges made by the company pending the appeal be not sustained on such appeal."

The body or agency from which the appeal is taken is thus authorized to impose the terms or conditions upon which the *supersedeas* shall be operative upon itself. These accounts and reports must be satisfactory to the Corporation Commission "under penalty of the immediate enforcement of the order or requirement appealed from." No matter how unjust or how burdensome or how totally impossible of performance those conditions as to keeping accounts and making reports may be made, no appeal lies to the Supreme Court of Appeals from the imposition of those conditions.

The language of 156 *(d)*. (Appendix, p. 13, 14, which gives the Supreme Court of Appeals jurisdiction on appeal from an order of the Corporation Commission "refusing to approve a suspending bond," plainly does not include more than an appeal from the *security* entered. By 156 (*e*) (Appendix, p. 14, 15) the superseding bond must "first have been executed and filed with and approved by, the commission." Nor does the Act of April 15, 1903 (Appendix, p. 23) nor any other Act provide for an appeal from such an order requiring accounts. Therefore, the conclusion seems to be certain that no appeal lies from the Commission's order requiring accounts to be kept. If the question were one of *doubt*, that doubt must in this Court be removed by assuming that the question of interpretation would be decided against the complainants by the highest court of the State. This precise question was decided expressly by the Supreme Court of the United States, without dissent, in Cotting *v.* Godard, 183 U. S. at p. 100

(1901). Mr. Justice Brewer pertinently asked and answered the question:

> "Must the party upon whom such a liability is threatened take the chances of the construction of a doubtful statute? If the one construction is placed upon it, then obviously * * * a single day's violation of the statute would exhaust such entire value in satisfaction of the penalties incurred."

The body appealed from has therefore power to nullify the right of appeal.

No parallel can be found to such a procedure. To make a parallel it would be necessary to establish a novel rule in equity practice that hereafter no injunction shall be operative unless the plaintiff shall conform to such terms and conditions as the defendant may impose.

5. The effect of the Virginia Constitution is to deprive the Railroads of an appeal from the Supreme Court of Appeals of Virginia to the Supreme Court of the United States on the question of the reasonableness of a railroad rate fixed by the State Corporation Commission.

The Constitution of Virginia expressly provides that the Supreme Court of Appeals shall not merely declare a rate fixed by the Commission to be unreasonable but—

> "shall at the same time substitute therefor such order as, in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise the reversal shall not be valid." (Constitution of Virginia, Sec. 156*g*; Appendix to Brief p. 16, 17.)

We shall show that the jurisdiction of the Circuit Court of the United States is not affected by the question whether an appeal may or may not be taken to the Supreme Court of the United States from the final order of the Virginia Supreme Court of Appeals making a new rate.

But we here insist that under the jurisdictional statute

fixing the appellate powers of the Supreme Court of the United States by writ of error to the highest courts of the various States there could be no appellate jurisdiction taken over the mere fixing of a railroad rate.

With respect to the appellate jurisdiction over the courts of a State, Section 709 of the Revised Statutes of the United States plainly confers appellate jurisdiction upon the Supreme Court of the United States only from *a judgment or decree in a suit* in a State Court.

The express language of the Statute is:—

> "A final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had &c."

The Supreme Court of Appeals of Virginia on an appeal from a rate fixed by the State Corporation Commission case affirm the rate as reasonable.

But if it finds a rate unreasonable the Constitution of Virginia *compels the Supreme Court of Appeals to make a new rate.*

The making of a new rate being admittedly an act of legislation (see *post*, pages 71, 79 of this Brief) no writ of error or appeal would lie to bring such a record to this court.

* * * * * * * *

The conclusion, which we submit, inevitably follows from the above summary of the provisions of the Constitution of Virginia is that far from providing as plain, adequate and complete a remedy as the process of equity jurisdiction, the contrary is the fact as to the appellate jurisdiction of the Virginia Supreme Court of Appeals. Insuperable obstacles are placed in the way of appeal by the Virginia Constitution. No judicial power exists in Virginia to prevent a multiplicity of litigation. No judicial power exists in Virginia either by appeal or original suit to prevent the occurrence of irreparable loss of income. The Corporation Commission itself, from whose order the imaginary right of appeal is given, may frustrate the ap-

peal by imposing upon a *supersedeas* conditions impossible of performance.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS OF VIRGINIA PRESCRIBING THE PROCEDURE WHICH MUST BE FOLLOWED IN CONTESTING RATES BEFORE THE STATE CORPORATION COMMISSION AND IN THE SUPREME COURT OF APPEALS OF VIRGINIA DO NOT AFFORD AN ADEQUATE REMEDY AT LAW BECAUSE THOSE PROCEEDINGS DO NOT CONSTITUTE DUE PROCESS OF LAW.

The Appellees rely upon the following propositions in support of the position that because due process of law is denied there is as above stated (Point III) no adequate remedy at law. These propositions are so intimately connected with the discussion of the Appellant's sixth ground of demurrer (viz., that this suit is an attempt to enjoin proceedings in the Court of a State) that a fuller discussion of some of these propositions will be presented under Point VII of this brief.

But these propositions are nevertheless also directly in point to establish the position that there is no adequate remedy at law because due process of law is denied and therefore require some examination under this Point III.

(1.)

When the power to establish rates is delegated to Administrative Officials such as a Railroad Commission, the functions of the Commission in considering what rates shall be prescribed by it to control in the future are legislative in character.

(2.)

After such rates have been determined upon the action of the Commission looking to their enforcement is ministerial or administrative in character, is not judicial in character and is not the enforcement of any judicial judgment or decree of a court.

(3.)

Where the establishment of a rate is delegated to administrative officials (such as a railroad commission) the question of the reasonableness of a rate after such a rate has been prescribed by such a body is a judicial one. Such a commission cannot establish, arbitrarily and without regard to justice and right, a tariff of rates which is so unreasonable as to practically destroy the value of the property of railways, or impairs the obligation of a charter contract and in such a case there is an ultimate remedy in the courts for relief against such oppressive legislation and especially in a court of equity of the United States.

The application of the foregoing three propositions to the discussion of the present Point III—*that the Railroads of Virginia are without adequate remedy at law*—lies in the following positions which the complainants now advance:

The Complainant is without adequate remedy at law because,

Due process of law is denied by a State to a railroad or any other public service company seeking to contest the reasonableness of a legislative tariff of rates if a trial before a Court of Equity is denied. Only a Court of Equity is competent to meet such an emergency and determine once for all and without a multiplicity of suits, matters that affect not simply individuals but the interests of the entire community. Due process of law must be such a proceeding as is appropriate to the case and adapted to the end to be attained. What is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another.

Due process of law demands an impartial tribunal. It is not due process of law under the Fourteenth Amendment nor a judicial inquiry to empower a rate-making agency of a State to sit in judgment upon the reasonableness of its own legislative act. Though such agency

may be denominated a " Court of record " or be given certain powers of a Court of record and although its procedure may partake of the semblance of judicial forms yet the procedure is not due process of law and is not judicial procedure where one party to a controversy is empowered to decide that controversy for itself and such a function is not within legislative authority because it is not the establishment of any rule of action or decision but is a placing of the other party so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of persons whose interest it will be to decide against him arbitrarily and unjustly.

Hence the State Corporation Commission of Virginia is merely an administrative agency of that State and is not clothed with the judicial functions and machinery provided and approved by the wisdom of successive ages and which are characteristic of a court of justice proceeding according to the course of the Common Law and the course of Equity; and, therefore, it is in no sense a court.

The question of the unreasonableness of a rate prescribed by a rate-fixing tribunal is a judicial question to be determined ultimately by the Courts, either State or Federal, if there is to be due process of law. This question cannot be so conclusively determined by the Legislature of a State or by regulations adopted by a State agency under its authority, as to make it unnecessary to due process of law that the question should become the subject of judicial inquiry.

A notice and a hearing may both concur. They may each be required as a preliminary step to the act of making a rate and yet there may be no due process of law. The body before which the hearing upon notice occurs may, like the Virginia State Corporation Commission for the reasons last above set forth be an invalid body by the very law of its creation.

(See further discussion of this proposition and authorities under Point VII of this Brief, pp. 99-116.)

Nothing could be more erroneous than to say that regardless of the appropriateness of the tribunal, that regardless of the impartiality of the tribunal, all that *due process* demands is *"reasonable notice and a fair opportunity to be heard."*

A very different definition of due process is that given by Judge Cooley:

> "Due process of law *in each particular case* means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe *for the class of cases to which the one being dealt with belongs."*
>
> Cooley's Const. Lim., (7th Ed.) p. 506.

The foregoing language was approvingly quoted by Mr. Justice Harlan in Chicago &c. R'd *v.* Chicago, 166 U. S. at p. 240 (1897).

See also Cooley's Constitutional Limitations p. 502 (7th Ed.) to the effect that what may be sufficient process in one case may not be sufficient in another.

And a very different definition of due process is that of Mr. Justice Field in Hagar *v.* Reclamation District, 111 U. S. 701 at p. 708 (1884):

> "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, *is appropriate to the case* and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; *it must be adapted to the end to be attained;* and wherever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought."

Mr. Justice Bradley, in a concurring opinion in the case of Davidson *v.* New Orleans, 96 U. S. at page 107 (1878), said:

> "I think, therefore, we are entitled, under the fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; *and if found to be suitable or admissible in the special case*, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

The very familiar definition of "due process of law" which Mr. Webster formulated and which has been approvingly recognized by this Court (Hovey *v.* Elliott, 167 U. S. 418) declares in part:

> "The meaning is that every citizen shall hold his life, liberty, property and immunities *under the protection of the general rules which govern society*"

is violated by the Virginia Constitution, which makes special rules for the railroads depriving them of the protection of those general rules of equitable jurisdiction which govern society.

In Anderson *v.* Messenger, 158 Fed. 250, Circuit Court of Appeals, 6th Circuit, Dec. 17, 1907, Severns, District Judge, delivering the opinion of the Court, on page 257 said:

> "The fourteenth amendment to the Constitution in requiring due process of law formulated a principle of justice which had long been recognized. It applied to the legislation of the States an elementary principle which had been imbedded in the institutions of government from the time of Magna Charta that a man may not be disturbed in his rights of person or property unless by due process of law, which always includes notice and an opportunity to be heard. And it made complaints of the violation of this enactment

justifiable by the courts of the United States. But before that time it was a principle in the fundamental law of several states; and the federal courts in administering the law of the states were bound to recognize and enforce it."

In Violett v. Alexandria, 92 Va., 561 569 (1896), the Virginia Court of Appeals quoted with approval the following language from the opinion of the Court of Appeals of New York.

> "It may, however, be stated generally that due process of law requires *an orderly proceeding, adapted to the nature of the case*, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. We cannot conceive of due process of law without this."

And, again, in the same opinion on page 572 an essential element of due process is declared to be a hearing

> "before some authority competent to afford relief in case of invalidity or injustice."

On page 573 it is recognized that the proceeding must be "*appropriate to the nature of the case.*"

In the same case the Court on page 567, in discussing what is due process of law, quotes with approval the following:

> "Without attempting to answer this question (what is 'due process of law') by a general definition, it is sufficient for the present enquiry to say that all the authorities agree that due process of law requires that a person shall have reasonable notice, and a reasonable opportunity to be heard before *an impartial tribunal*, before any binding decree can be passed affecting his right to liberty or property."

Due process of law implies the administration of equal laws before an impartial tribunal according to established

rules not violative of fundamental principles of private right and that such competent and impartial tribunal having jurisdiction of the case shall proceed upon notice and hearing.

The basis of due process is an orderly and appropriate proceeding before a competent and impartial tribunal according to the law of the land by customary rules of procedure. While a proceeding upon notice and hearing may, according to the character of the question involved or of the tribunal having jurisdiction thereof, be appropriate in certain cases, and while in certain cases due process of law may be afforded without a jury trial or any right of appeal, yet in certain other cases, according to the character of the question involved or of the tribunal passing on the question, mere notice and a hearing may not be sufficient to afford due process of law.

A difference in the character of the question involved and of the tribunal passing upon it determines whether the procedure is appropriate to the question and whether or not the procedure is had before a competent and impartial tribunal by customary rules of procedure.

In other words, to afford due process of law there must be, according to the character of the question involved, not only in form but in fact an orderly and appropriate proceeding before a competent and impartial tribunal according to the law of the land by customary rules of procedure.

The proposition is of course true that due process of law does not depend upon the same *modus procedendi* in every case *ex. g.*—a jury trial is not an indispensable requisite. But it is equally true that the *modus procedendi* must be *appropriate* to the particular case; "it must be adapted to the end to be attained." And it must be an impartial *modus procedendi.*

The proper and the only mode of judicial relief against a tariff of rates established by or enforceable by a commission is by a Bill in Chancery asserting its unreasonable character and its conflict with the Constitution of

the United States. Only a Court of Equity is competent to meet such an emergency and determine once for all and without a multiplicity of suits matters that affect not simply individuals but the interests of the entire community.

In Chicago &c. Ry. Co. *vs.* Minnesota, 134 U. S., 460 (1889), Mr. Justice Miller concurring said:

> "The proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its rights to collect the rates as being within the limits of a just compensation for the service rendered."

In Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. at p. 397, Mr. Justice Brewer, for the court, said:

> "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; * * * *but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation.*"

And in the preceding part of the same opinion (page 395) he says:

> "If in any case there should be any mistaken action on the part of a state, or its commission, injurious to the rights of a railroad corporation, any citizen of another state, interested directly therein, can find in the Federal Court all the relief which a court of equity is justified in giving."

And that statement quite plainly recognizes that the Court applied to must have the power to issue a preliminary injunction for the learned Justice previously has that situation in mind (p. 394):

> "The argument is, in substance, that railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, cannot be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property, that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable, and oppressive regulations may be prescribed by the commission."

And again in Railway Company *v.* Gill 156 U. S. 649: (1895) Mr. Justice Shiras observed (p. 666):

> "Sometimes, in acting on this subject, the State legislatures have created commissions or boards of public works with power to establish rates for the transportation of passengers and freight; and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed,—that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding wherein the rights of the public as well as those of the company complaining can be protected."

Mr. Justice Harlan in delivering the opinion of the Court in Smyth *v.* Ames, 169 U. S. at p. 518 (1898) said:—

> "The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits matters that affect not simply individuals but the interests of the entire community."

This Court, in Detroit *v.* Detroit Citizens' Street R. Co., 184 U. S. at page 381, reiterated with approval the foregoing language:—

> "Only a Court of Equity is competent to meet such an emergency," etc.

Mr. Justice Peckham, after there quoting from the above opinion of Mr. Justice Harlan in Smyth *v.* Ames, added:—

> "It is a matter of general public interest as well as of vital importance to the complainant, that the question involved in this litigation should be determined at the earliest possible moment, and once for all, and thus a multiplicity of suits and other complications prevented."

In the Circuit Court of the United States for the District of Massachusetts, Lowell, D. J., remarked in Haverhill Gaslight Co. *v.* Barker *et al.* 109 Federal, 694 (1901)—a case similar to the one at bar on the point under discussion:—

> "From these cases it appears that the supreme court considers a bill in equity the most appropriate method of determining a controversy like that presented in the case at bar. The method has been followed in many cases in the circuit court." * * *

The settled maxims of law declared by the Supreme Court of the United States prescribe that the relief to which appellees are entitled should be obtainable in a Court of Equity. Why cannot individual rights in such cases be otherwise protected?

The answer has been already substantially stated:

Only a tribunal invested with the powers of a Court of Equity can prevent a multiplicity of litigations, can preserve by injunction the *Status quo* pending the inquiry and final decision as to whether a given rate complained of is constitutional or unconstitutional and hence only a Court of Equity can prevent irreparable loss of income.

Mr. Justice Brewer observed in Chicago M. &c. Ry. *v.* Tompkins, 176 U. S., at p. 180 (1900), and this observation is here worthy of much consideration:

> "It is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests."

This Court in *Ex parte* Young 209 U. S. 123 (1908) has also recently reiterated that the only way by which the large property interests of Railroads and other public service Corporations can be protected from such legislative wreckings is by a bill in equity in a State or Federal Court of Chancery powers.

True the language of Mr. Justice Peckham about to be quoted is directed to pointing out the contrast in point of efficiency between determining the reasonableness of a State rate by indictment and the determination of that issue by equitable process for relief.

Nevertheless, the language of the opinion in *Ex parte* Young recognizes a principle which in view of the obstructed appellate jurisdiction in Virginia and the negation of all right to file a bill in equity is equally applicable to the suit now before this Court:

"To await proceedings against the Company in a State Court grounded upon a disobedience of the act, *and then, if necessary, obtain a review in this Court by writ of error to the highest State Court, would place the Company in peril of large loss.* * * * *if it should be finally determined that the act was valid.* This risk the Company ought not to be required to take. Over eleven thousand millions of dollars, it is estimated are invested in railroad property * * * and they are entitled to equal protection from the laws and from the courts with the owners of all other kinds of property, no more no less. THE COURTS HAVING JURISDICTION, FEDERAL OR STATE SHOULD AT ALL TIMES BE OPEN TO THEM AS WELL AS TO OTHERS FOR THE PURPOSE OF PROTECTING THEIR PROPERTY AND THEIR LEGAL RIGHTS.

All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, AND ENJOINING THE ENFORCEMENT OF THE ACT UNTIL THE DECISION OF THE COURT UPON THE LEGAL QUESTION. * * * The question of sufficiency of rates is important and controlling, and being of a judicial nature it ought to be settled at the earliest moment by some court, and when a Federal Court first obtains jurisdiction it ought on general principles of jurisprudence to be permitted to finish the inquiry and make a conclusive judgment to the exclusion of all other courts."

Is it indeed true that to this most fundamental and most important principle of Federal Constitutional law and of Federal Equity Jurisdiction an exception has been successfully invented by the framers of the Virginia Constitution?

The conclusion reached under this subdivision of Point III therefore is, that there is no adequate remedy at law because there is not due process of law; that due process of law is denied because all equitable jurisdiction is denied

and because there is substituted for the jurisdiction of a Court of Chancery the jurisdiction of an agency which by the law of its creation is an interested and not a disinterested body and hence cannot act with that judicial impartiality which is essential to due process.

But no matter what may be the adequacy or the inadequacy of the original and appellate procedure under the Virginia Constitution, the principle frequently asserted by the Supreme Court of the United States here applies,—that the Equity jurisdiction of the Federal Courts cannot be impaired or diminished by the Statutes of the several States regulating the practice of their own Courts, even though a remedy is created by such Statutes which may be the full equivalent of the jurisdiction of the Federal Chancery.

It is clear, without argument, that prior to the Virginia Constitution of 1902 the cases of the Complainants in these bills of complaint would have been cognizable in Equity because of the grounds of equitable jurisdiction here present and within the jurisdiction of the Federal Court below because of the Constitutional questions herein involved.

In Reagan *v.* Trust Co., 154 U. S. at p. 395 (1894), Mr. Justice Brewer said:

> "No legislation of a state, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal Courts sitting as Courts of Equity."

In Smyth *v.* Ames, 169 U. S. 466, it was contended that the plaintiffs had an adequate remedy at Law and that the Circuit Court of the United States sitting in equity was without jurisdiction. Mr. Justice Harlan in delivering the opinion in that case said (pp. 515, 516):

> "It was contended that the plaintiffs had an adequate remedy at law, and that the circuit court of the United States, sitting in equity, was therefore without jurisdiction. This objection is based upon the 5th section of the Nebraska statute authorizing

any railroad company to show, in a proper action brought in the supreme court of the state, that the rates therein prescribed are unreasonable and unjust. * * *

"We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

There was nothing novel in the principle above applied to a State procedure even though that procedure provided a remedy for testing the reasonableness of rates. The principle was familiar in the time of Judge Story who said:

"It has been often decided by the supreme court that the equity jurisdiction of the courts of the United States is not limited or restrained by the local remedies in the different states; that it is the same in all the states and is the same which is exercised in the land of our ancestors, from whose jurisprudence our own is derived." Pratt *v.* Northam, 5 Mason, 95, 105; 19 Fed. Cas. No. 11,376."

So also Judge Curtis declares:

"When the judiciary act speaks of a plain, adequate, and complete remedy at law, it refers to the common law, not to the statutes of the states. * * * The equity jurisdiction of the courts of the United States is the same in all the states." Cropper *v.* Coburn, 2 Curt. 465, 472; 6 Fed. Cas. No. 3416.

This principle that the equity jurisdiction of the Federal Chancery cannot be reduced or curtailed by a State's legislation is expressly decided in several familiar cases by this court.

In Payne v. Hook, 74 U. S. 425 (1868), (7 Wall. 425) a suit on the jurisdictional basis of diversity of citizenship was brought in the Circuit Court for Missouri "to compel the defendant Hook to account and pay over to Mrs. Payne her rightful share in the estate of her brother."

The objection to the jurisdiction was taken that resort must be had to the Probate Court of Missouri as that court had exclusive jurisdiction under the State law over the account of the defendant and that the administration was still in progress in such Probate Court.

Mr. Justice Davis delivered the opinion:—

> "The theory of the position is this: that a Federal Court of Chancery, sitting in Missouri, will not enforce demands against an administrator or executor, if the court of the State, having general chancery powers, could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local Court of Probate, she has no better or different rights, because she happens to be a citizen of Virginia.
>
> "If this position could be maintained, an important part of the jurisdiction conferred on the Federal Courts by the Constitution and laws of Congress, would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a state tribunal, of what value would that right be, if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this court, and overruled.

"We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' * * * If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union. * * *

"The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings. Watson *v.* Sutherland, 5 Wall. 78."

In McConihay *v.* Wright, 121 U. S. 201 (1887), a bill in equity was filed in the District Court of the United States for the District of West Virginia to quiet title to certain real estate in West Virginia. A demurrer was interposed upon the ground that under the statute of West Virginia a remedy by the action of ejectment had been provided against any one claiming title to real estate, although not in possession. It was held that even the creation of this plain, adequate and complete remedy at law by the Legislature of West Virginia in 1868 did not operate to reduce the jurisdiction of the United States Courts in Equity under the Judiciary Act of 1789. The language of Mr. Justice Matthews, speaking for the unanimous court in the foregoing case, is as follows (p. 205):

> "The contention of the appellants, however, is, that by the Statute of West Virginia the complainant might have maintained an action of ejectment. Reference is made in support of this contention to the West Virginia Code of 1868 chapter 90, to show that an action of ejectment in that State will lie against one claiming title to or interest in land, although not in possession. Admitting this to be so, it, nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and Acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several States regulating the practice of their own courts. Bills *quia timet*, such as the present, belong to the ancient jurisdiction in equity; and no change in state legislation giving, in like cases, a remedy by action at law, can of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Act of Congress."

In Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574 (1893), the facts were that the statute of Alabama provided for an action at law as well as for a suit in equity to enforce a mechanics' lien.

This court held that the Equity jurisdiction of the federal court was not ousted by the existence of a remedy at law.

It was said by Mr. Justice Brewer, (p. 579):

> "It may well be affirmed that a state, by prescribing an action at law to enforce even statutory rights, cannot oust a federal court, sitting in equity, of its jurisdiction to enforce such rights provided they are of an equitable nature."

The above cited case of McConihay *v.* Wright was quoted with approval by Mr. Justice Brewer in Mississippi Mills *v.* Cohn, 150 U. S. 202 (1893), wherein the facts were as follows:

A suit in equity was brought in the Circuit Court for the Western District of Louisiana and the object of the suit was to set aside a judgment obtained through fraud and to subject a debtor's property to the payment of the debts due his creditors.

The Circuit Court dismissed the bill on the ground that there was no jurisdiction. The Court below held that there was a plain and adequate remedy at law. This decree was reversed for the reasons thus set forth by Mr. Justice Brewer (p. 204):

> "It is well settled that the jurisdiction of the Federal Courts sitting as courts of equity is neither enlarged nor diminished by state legislation. Though by it all differences in forms of action be abolished; though all remedies be administered in a single action at law; and, so far at least as form is concerned, all distinction between equity and law be ended, yet the jurisdiction of the Federal court, sitting as a court of equity, remains unchanged. * * * If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation, or restraint by state legislation, and is uniform throughout the different states of the Union."

It was said by Lord Eldon in Eyre *v.* Everett, 2 Russ. 381:

> "This court will not allow itself to be ousted of any part of its original jurisdiction, because a court of law happens to fall in love with the same or a similar jurisdiction."

The conclusion of the argument under Point III is therefore that there is no adequate remedy at law obtainable by the appellees under either the common law or the Constitution and Statutes of Virginia, that the Constitutional and statutory provisions of Virginia afford no adequate remedy at law, but on the contrary deprive the appellees of their property without due process of law, that even if this procedure of the Virginia Constitution were adequate, and even if there was no deprivation of due process of law the equity jurisdiction of the court below would not be destroyed.

POINT IV.

In determining what is due process of law regard must be had to substance and not merely to form.

It will be observed that in many cases the object of the suit or appeal was to challenge the constitutionality of the formalities of procedure *and not, as in the case at bar, to challenge both the procedure and also the confiscatory result of the rate.* Such cases are readily distinguishable.

Our contention is that no matter how protected by the safeguards of due notice and a fair hearing, and an adequate right of appeal to the Courts of a State, the act of rate making may be, if the rate when made is unreasonably low, it is a violation of the 14th Amendment,—for it is a taking without compensation of the property of A and giving it to B; it is arbitrary spoliation; it is confiscation, or, as it is termed by the Federal Supreme Court, a taking without due process of law.

The inhibition of the 14th Amendment applies to every agency of a State and to every officer or agent by whom her powers are exerted. Whoever, by virtue of his public position under a State government, whether that action be executive, legislative or judicial, deprives any other of life, liberty or property without due process of law, violates that inhibition, and, as he acts in the name and for the State and is clothed with her power, his act is her act

within the meaning of the XIV Amendment. Otherwise, the inhibition has no meaning and the State has clothed one of her agents with power to annul or evade it.

Mr. Justice Field in delivering the opinion of the court in Cummins *vs.* State of Missouri, 4 Wallace 277, said (page 325):

> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. * * * If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

In Chicago, Burlington & Quincy R. R. Co. *v.* Chicago, 166 U. S. 226 (1897), Mr. Justice Harlan, who delivered the opinion of the court, said on page 234:

> "A state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. *In determining what is due process of law regard must be had to substance, not to form.*"

And again on page 240, after quoting from Cooley's Constitutional Limitations:

> "In his discussion as to the meaning and scope of the 14th Amendment the same writer in his edition of Story on the Constitution, after observing that every species of individual property was subject to be appropriated for the special needs of either the state or national government, but that the power to appropriate was subject to the restriction, among others, that it must not be exercised without making due compensation for whatever is taken, says: 'Due process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may

be made and how the compensation shall be assessed; and second, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them.' 2 Story, Const. §1956."

And again, on page 241:

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

And Mr. Justice Brewer, in his dissenting opinion said on page 259:

"I approve that which is said in the first part of the opinion as to the potency of the 14th Amendment to restrain action by a state, through either its legislative, executive, or judicial departments, which deprives a party of his property without due compensation; also the ruling that 'due process' is not always satisfied by the mere form of the proceeding, the fact of notice, and a right to be heard. I agree to the proposition that 'a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction, for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment to the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

This proposition, that there is always open for judicial investigation the question whether regardless of the mode of procedure there has in actual fact been a confiscation of property by an unreasonable rate is brought out perhaps more clearly than elsewhere in the case of San Diego Land and Town Co. v. National City, 174 U. S. 739 (1899), where the Supreme Court of the United States though affirming a decree of the Circuit Court and dismissing a suit to declare void as unreasonably low the water rates fixed by municipal authorities under the provisions of the Constitution and laws of California, said through Mr. Justice Harlan (p. 754):—

> "In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States a judicial question arises, and the courts, Federal and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law."

The Supreme Court held in conclusion that the Circuit Court's decree dismissing the bill was proper, in that no *confiscation* of property was proved. But this investigation of the issue by the Supreme Court establishes in conjunction with the other authorities that it is a principle of Constitutional law that such an investigation of the substantial effect of a rate is within the judicial power of the United States and that a rate which is non-compensatory is unconstitutional deprivation.

The decisions show conclusively that, in the opinion of this Court the due process of law guaranteed by the Fourteenth Amendment, as applied to the fixing of rates to be

charged for a public service by a *quasi* public corporation involves two elements:

(1) A regular, orderly, appropriate and impartial proceeding,

(2) A determination in that proceeding which will not deprive them of any property right without just compensation therefor.

Due process of law is not afforded if the second of these requisites is absent, no matter how specious may be the compliance with the first requisite.

In other words, if an order or decree of a state board or tribunal has the effect of depriving any person or corporation of a property right without just compensation therefor, that order or decree is in violation of the constitutional prohibition against taking property without due process of law, although the order or decree may have been rendered in a proceeding regularly instituted, of the subject-matter of which the board or tribunal had jurisdiction, against parties of whom the board or tribunal had jurisdiction, and which was carried out to its culmination in the order or decree complained of, by a lawful and orderly method of procedure, in which the parties had full opportunity to be heard.

That due process of law necessarily involves both of the elements mentioned above, and that the second is as essential as the first, if not more so, is clearly shown by the language of Mr. Justice Harlan, in Chicago, Burlington and Quincy Railroad Co. *v.* Chicago, 166 U. S. 226 (1897), where he said on page 234:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right

and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. United States *v.* Cruikshank, 92 U. S. 542, 554; Leeper *v.* Texas, 139 U. S. 462, 468. But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. *Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form.* This court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson *v.* New Orleans, 96 U. S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

POINT V.

The subject matter of these suits is not Res Adjudicata.

[Answering the fourth ground of the demurrer and the second plea to the effect that the matters and things complained of in said bill are *res adjudicata.*]

The purport of this ground of demurrer and of the second plea is that under the Constitutional provisions and legislation of Virginia creating the State Corporation Commission, a method has been successfully devised whereby a state by its action, and by its action alone, may

paralyze and destroy the equitable jurisdiction of the Circuit Courts of the United States under the Constitution and laws of the United States to protect the rights of Appellees given them by the Constitution of the United States.

The answer to this contention of the appellants that the matters and things complained of in the bill are *res adjudicata* is that,—

That doctrine applies only to orders and decrees rendered in a judicial or *quasi*-judicial proceeding; and, the rate fixed by the Commission was not a judicial proceeding because the Supreme Court of the United States has expressly declared that the act of a State agency in fixing rates for a public service is not a judicial or *quasi*-judicial act, but is a completed legislative act.

To the appellant's contention that the Corporation Commission of Virginia is a Court, we shall hereafter reply at some length under Point VII of this argument; and we believe that we shall establish later to the satisfaction of this Court that the Virginia Corporation Commission is not a Court of a State.

The fixing of a rate by the Virginia State Corporation Commission is, we submit, not a judicial judgment. But conceding it so to be, such a judicial judgment would be void because it is the act of an unconstitutionally created body which has been vested with incompatible powers of legislation and judicature.

If this proposition shall be successfully maintained by the Appellees, the defense of *res adjudicata* now under discussion necessarily falls.

Nevertheless, at the present stage of the argument, under point V of this brief (and aside from the argument that this Virginia Commission is not a Court), we shall endeavor to show that the fourth ground of demurrer and the second plea were properly overruled for the reason that the doctrine of *res adjudicata* has no application where a rate has been fixed by the legislature of a state or by some rate making agency of a state.

In Reagan *v.* Farmers' Loan & Trust Co. 154 U. S. 362 (1894), one ground of the demurrer was:

> "Because it appeareth from the face of the bill of complaint that complainant seeks to enjoin the judgment of a special tribunal of the State of Texas, said tribunal having jurisdiction under the Constitution and laws of Texas to try and determine the special matters sought to be enjoined and from which judgment a plain and adequate remedy by appeal had been granted to all parties interested by the laws of Texas." (Reagan *v.* Trust Co., Transcript of Record, page 266.)

Upon this ground of demurrer in the Reagan Case the following facts are important:

1. The Texas Railroad Commission was authorized to establish the rate upon due notice to the railroads and after a hearing.

2. The notice and hearing prescribed by the Texas law was given.

In the argument for the appellants, (Reagan *v.* Trust Co., 38 Law Ed. page 1019.) the Texas Railroad Commissioners distinctly raised the point that:

> "The railroad Commission is a special tribunal peculiarly adapted to discharge the duties devolved upon it and invested with legislative and judicial, or certainly, *quasi* judicial powers, which are to be exercised after the manner of the legislature and the courts.
>
> "When rates are established either by the legislature or a Commission, whether they are reasonable is a legislative or administrative question and not ordinarily the subject of judicial investigation and determination."

This argument was answered by a decree that the defendants in the Reagan case be enjoined and the decree was affirmed by this Court.

No valid reason can be advanced by the Appellants why the Virginia rate as fixed by the Appellants is protected from judicial investigation by the doctrine of *res adjudicata* when rates, fixed by the Commissions of other States, upon notice and hearing, have been repeatedly inquired into judicially, (as in the following cases) and when found unconstitutional have been judicially condemned and enjoined.

Chicago, Milwaukee and St. Paul Ry. Co. *v.* Minnesota, 134 U. S. 418 (1890);

Reagan *v.* Farmers' Loan and Trust Co., 154 U. S. 362, (1894):

Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558 (1900);

Chicago, St. P. &c. Ry. *v.* Becker *et al.*, Railroad & Warehouse Commissioners, 35 Fed. 883 (1888).

In other words, no matter what may be the form of the proceeding which results in the fixing of rates for a public service, that proceeding is essentially legislative in character, and the regulation of rates in which that proceeding culminates is a legislative regulation, and is always open to the inquiry and control of a court of equity; and neither the essentially legislative character of the proceeding of rate regulation, nor the ministerial character of the act of rate enforcement can be altered by giving to the rate making and rate enforcing body the name of a Court.*

The conclusion therefore reached under Point V is that the doctrine of *res adjudicata* has no application.

POINT VI.

These suits are not in violation of the Eleventh Amendment, because they are not suits against the State of Virginia.

[Answering the 5th ground of Demurrer to the effect That this court has no jurisdiction to hear and deter-

* See addendum inserted at end brief.

mine these causes for the reason that they are suits against the State of Virginia.]

In view of the numerous recent decisions of this court, holding that a suit may be maintained by a bondholder of a railroad company or by the railroad company itself, to enjoin a state railroad commission or an Attorney-General of a State from enforcing a schedule of rates which will cause either an unconstitutional impairment of a contract, or an unconstitutional deprivation of property, an extended examination of these cases has become at the present time wholly unnecessary.

This Court, after the Reagan Case, having decided that the Nebraska Board of Transportation was also subject to injunction, and that such a suit was not against the State of Nebraska, in Smyth *vs.* Ames, 169 U. S. at page 518 (1898), and having so recently decided that the Railroad and Warehouse Commission together with the Attorney-General of Minnesota may be enjoined from enforcing a deprivatory rate, *Ex parte* Young 209 U. S. 123 (1908), the fifth ground of demurrer must be overruled.

For the reasons so fully set forth in the case, *Ex parte* Young, there is no merit in any contention on the authority of Fitts *v.* McGhee, 172 U. S. 516 (1899) that the present bill in equity is a suit against the State of Virginia.

The present suit is brought against the members of a board called the State Corporation Commission of Virginia who are specially charged by the Virginia Constitution, Article XII, Sec. 156 (c) (Appendix p. 12 and 13) to enforce the rate herein complained of by fining the offending corporation:

> "Any corporation failing or refusing to obey any valid order or requirement of the Commission, within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission such sum, not exceeding five hundred dollars as the Commission may deem proper, or such sum in excess of five hundred dollars as may be prescribed or authorized by law." * * *

In short, the State of Virginia has no interest in the present controversy whatever. In the words of Mr. Justice Brewer in the case of Reagan *vs.* Farmers Loan & Trust Co., 154 U. S. 362-390 (1894):

> "So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property."

The same ground was also taken in Missouri, K. & T. R. R. Co. *v.* Hickman, 183 U. S. 53 (1901).

And in the words of Mr. Justice Peckham in *Ex parte* Young, 209 U. S. 123 (1908).

> "Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State and who threaten and are about to commence proceedings either of a civil or criminal nature to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of Equity from such action."

And in another part of the same opinion, and directly upon the point to be adjudicated, Mr. Justice Peckham said:

> "The being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the State."

POINT VII.

These suits are not in violation of Section 720 of the Revised Statutes of the United States forbidding an injunction to stay proceedings in any Court of a State, because the Act of the Appellants sought to be enjoined is not a proceeding in a State Court of Virginia within the meaning of that statute.

[Answering the 6th ground of demurrer and the Plea of defendants, Stuart, Willard, and Wilson, filed August 5, 1907, that the Appellants are a Court.]

This plea sets forth one single ground of defence, viz:—

> "That this suit cannot be entertained by this Court because of the inhibition of sec. 720 of the Revised Statutes of the United States" for the reason that:
>
> * * * * * * *
>
> "the said State Corporation Commission of Virginia is a 'Court' of the said State, within the true meaning, purport, intent, and purview of the aforesaid Act of Congress and was acting as such 'court' continuously from the inception of the aforesaid proceedings before it, referred to in said bill of complaint, up to and including the entry of its aforesaid order of April 27th, 1907, relating to the passenger rates of the plaintiff, and was also so acting in publishing said order, in accordance with the aforesaid laws of the said State, and was also so acting at the time this suit was instituted, and at the time the restraining order was granted in this suit, and will and must so act in any and all steps which it may hereafter take in respect to matters and things referred to in said bill of complaint."

(Record No. 270 p. 181, No. 271 p. 164, No. 272 p. 146, No. 273 p. 140, No. 274 p. 224, No. 275 p. 196.)

To the appellants' contention that this present suit cannot be maintained because the Virginia State Corporation Commission is a Court we reply:

1. That even if the Commission be in any sense a Court the act sought to be enjoined is an administrative and not a judicial act.

2. That the Virginia State Corporation Commission is not a Court within the purview of Section 720 of the United States Revised Statutes.

3. That even if the act sought to be enjoined were judicial and not administrative, even if the Commission were a Court within the meaning of Section 720, the Commission by the law of its creation is not a valid constitutional body under the Constitution of the United States.

Preliminarily to the presentation of the first of the three above and last mentioned positions we submit that,

The status of the Virginia State Corporation Commission before the Federal Courts in the present suit must be determined not by what the Commission is called but by ascertaining what the nature of the action is which is sought to be enjoined.

The statutes or constitution of a State may designate such a tribunal a court and may invest it with the powers and authorities of a court, but such designation and such powers do not make the tribunal a court, or its proceedings judicial.

This action which has been enjoined not being judicial but purely administrative in character, the Court below could properly enjoin it.

This court in *ex parte* Virginia, 100 U. S. 339, distinctly recognized the distinction between judicial and ministerial powers vested in a regular Court of Justice, and held that whether the act done by a Court is a judicial act or not is to be determined, not by the description or character of the court or tribunal but by the character of the act. Mr. Justice Strong in delivering the opinion of the Court said (p. 348):

"It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State Judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference."

The point is decided by Upshur County *v.* Rich, 135 U. S., 467, that a Court of West Virginia on which was imposed the duty of assessing taxes on appeal from an assessment did not act as a Court when it assessed taxes, but lost its judicial function, and therefore, such a proceeding was not a suit and was not removable to the Circuit Court of the United States.

This principle is also a familiar one in the law of Virginia, the Court of Appeals in that State having differentiated the functions of the County Court justices and held that in the exercise of their functions as "Commissioners of police" they were subject to *mandamus*.

Brander *v.* Chesterfield Justices, 5 Call, 651 (1805);
The Dinwiddie Justices *v.* Chesterfield Justices, 5 Call, 556 (1805).

In the following cases the *status* of a rate making, rate enforcing agency of a State were ascertained in the Fed-

eral Courts by examining and determining the nature of the act sought to be enjoined.

Southern Pacific Co. *v.* Board of Railroad Commissioners, 78 Fed., 236;
Busch *v.* Webb, 122 Fed., 655 (1903).

In Busch *v.* Webb, 122 Fed. 655 (1903), the question was whether a federal court could by injunction restrain the members of a commissioners' court from making publication of the result of an election or vote. The Circuit Court of the United States for the Eastern District of Texas said:—

> "The duty of said body to declare the result of said election and to publish such result is purely ministerial, and in no wise judicial. It is true that many duties of a court proper are ministerial, but they are clothed with judicial functions, such as deciding litigated questions between litigants, etc. The commissioners' court is not a court, in my opinion, within the meaning of said article 720 of the Revised Statutes."

In a recent case where the Supreme Court of the United States affirmed a decree enjoining the Railroad Commissioners of North Carolina, McNeill *v.* Southern Ry. Co., 202 U. S. 543 (1906), the pint was distinctly contended in the briefs in the Supreme Court that the suit was in violation of R. S. Sec. 720.

That contention in the Circuit Court below was thus disposed of in the opinion by Purnell, D. J., in 134 Fed. p. 94 afterwards affirmed by the Supreme Court: —

> "* * * True, the Corporation Commission of North Carolina is, in words, made a court of record, and it is conceded the Circuit Court of the United States cannot restrain a State court, but the Corporation Commission is vested with powers not judicial, some of which have been held to be legislative, some executive, and the restriction on the injunction of this Court as to State courts does not apply, especially inasmuch as the acts complained of and asked

to be enjoined are not judicial acts. As to these acts it is a State agency, not acting judicially."

Having shown that the nature of the act sought to be enjoined may be examined by the Federal Courts in order to determine whether that act is a "proceeding in a Court of a State," we shall next show the nature of the act enjoined by the Court below, and that

1. Even if the Commission be in any sense a Court, the act sought to be enjoined is an administrative and not a judicial act.

THE ISSUE PRESENTED BY THE DEMURRER AND PLEA IS ONE OF LAW—ARE APPELLANTS A COURT *quoad* THE ACT SOUGHT TO BE ENJOINED?

This plea having been set down for argument must be taken to be true in so far, but only in so far as it alleges facts. In so far as this or any other plea alleges conclusions of law, those allegations are not admitted but are challenged by setting down the plea for argument.

Therefore the allegations above quoted to the effect that the Corporation Commission was acting as a Court, etc., are mere conclusions of law not admitted by the Appellees, but challenged by the Appellees, and presented to the Court for its decision.

The following authorities conclusively show that setting down this plea for argument has merely raised the question of law whether the Virginia Corporation Commission is "a Court" of a State within the meaning of R. S. sec. 720.

Farley *v.* Kittson, 120 U. S. 303-318;
Bank *v.* Insurance Co., 104 U. S. 76, 77.

Upon the question of law raised by this demurrer and plea—whether or not the Circuit Court had jurisdiction to hear and determine this cause, for the reason that the State Corporation Commission is a "court" of the State of Virginia, and acting as such when taking steps to enforce

their order and the Circuit Court was therefore without power to enjoin the said Commission, the Circuit Court decided,

> "that in fixing the rates involved in this controversy, the Corporation Commission was exercising a legislative function, and therefore, was not acting as a court within the meaning of Sec. 720 of the Revised Statutes and its acts in attempting to put in force the rates thus established are administrative * * * the acts sought to be restrained being purely ministerial in their character." (Opinion of Pritchard, C. J., on the interlocutory injunction in these Suits. Record No. 270, p. 170, No. 271, p. 153, No. 272, p. 137, No. 273, p. 129, No. 274, p. 214, No. 275, p. 185.)

The object in presenting this defense by plea instead of by demurrer seems to be to enable defendants in their plea to set forth the Constitution and laws of Virginia, and the Rules of Order, Practice and Procedure before the Commission.

We rely upon the two following propositions respecting the nature of the act of rate making, of the act of rate enforcement, of the act of deciding concerning the reasonableness of an established rate.

(*a*) **Where the power to establish rates is delegated to Administrative Officials such as a Railroad Commission, the functions of the Commission in considering what rates shall be prescribed by it to control in the future are legislative in character.**

(*b*) **After such rates have been determined upon, the action of the State Corporation Commission looking to their enforcement is ministerial or administrative in character, is no longer legislative in character and is not judicial in character and is not the enforcement of any judicial judgment or decree of a court.**

We shall now examine these propositions at some length in their above order.

(*a*) **Where the power to establish rates is delegated to Administrative Officials such as a Railroad Commission, the functions of the Commission in considering what rates shall be prescribed by it to control in the future are legislative in character.**

It will be noted that all the proceedings which took place before the Virginia Corporation Commission culminating in the order of April 27, 1907, (the said order prescribing that on and after July 1, 1907, the appellees should put into effect the rates complained of) were had by the State Corporation Commission before it finally prescribed the said rates. All these proceedings were initiated solely by the State Corporation Commission by its notice of July 31, 1906, *and upon the petition or request of no other person or persons;* and after a hearing had before itself as the arbiter, the Commission, on April 27, 1907, made its final order prescribing the rates complained of in the bills of complaint. (Appendix, pp. 1, 2.)

Under the authority of Section 156*b* of the Constitution of Virginia the Commission had published on July 31, 1906, a general Notice set forth in all the Bills of Complaint, reading: "To the several Steam Railroad companies doing business in Virginia and all persons interested," to the effect that the Commission would on November 1, 1906, hear and consider any objections which might be urged against a general rule or order of the Commission fixing a maximum passenger rate of two cents per mile.

We submit that this notice and subsequent deliberation did not make the conclusion of the Commission fixing the rate a judicial judgment.

Section 156*b* of the Constitution of Virginia, is as follows:

> "Before the commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company, or companies to be affected

by such rate, charge, classification, order, rule, regulation or requirement shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission." (Appendix, pp. 10, 11.)

The deliberation or consideration in which a legislative or administrative body engages before it makes any law or order is entirely distinct from the judicial deliberation or consideration in which a Court engages before it decides that a law or order is Constitutional.

Is there any doubt that if the present maximum rate had been fixed *by the legislature* of Virginia, (that body, let it be assumed, having the power to make rates only after a hearing, and this commission being specially charged with the duty to enforce those rates,) the Court below would have had jurisdiction over the present suit to re-

strain the enforcement of the rate by the commission upon a showing of its unconstitutional nature and effect?

Such an injunction was granted in

Smyth *v.* Ames, 169 U. S. 466 (1898);
Ex parte Young, 209 U. S. 123.
Hunter *v.* Wood, 209 U. S. 205.

Is there any doubt that if the present maximum rates had been fixed by the ordinance of some municipality of Virginia (that body let it be assumed acting within the apparent scope of the authority conferred by the State law) the Court below, upon a proper case shown, would have power to enjoin the enforcement of such ordinance?

Such an injunction was granted in Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558 (1900).

We submit that the act of a Commission in establishing a rate made after a public hearing upon due notice to those affected is not rendered a judicial act by the mere incident of a hearing being given.

In previous cases where rates have been declared unconstitutional by the Supreme Court the rates were fixed by a State Commission after a hearing in accordance with the requirement of the law of the State.

It will be observed by this court not only that hearings were had but that hearings were expressly required to be had before the State Railroad Commissions in each of the following cases:

Reagan *v.* Trust Co., 154 U. S. 364 (1894);
Mississippi R. R. Com'n *v.* Illinois Central R. R., 203 U. S. 335 (1906);
Chicago &c. Ry. Co. *v.* Dey, 35 Fed. 866 (1888);
Northern Pac. Ry. Co. *v.* Keyes, 91 Fed. 47 (1898).

Thus in Reagan *v.* Farmers Loan & Trust Co., 154 U. S., at p. 364 (1894) the legislature of Texas (Act of April 3, 1891, Sec. 4) had provided that,

> "before any rates shall be established under this Act the Commission shall give the railroad company to be affected thereby ten day's notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be

> heard at such time and place, to the end that justice may be done; and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases."

The Texas Act furthermore provided a remedy for persons aggrieved by petition to a Court with an appeal from its final decree.

A notice was given and a hearing was had.

Mr. Justice Brewer, speaking for the Supreme Court in the last mentioned case held that (p. 394):

> "Such a Commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation."

In Mississippi Railroad Commission *v.* Illinois Central R. R. Co., 203 U. S. 335 (1906) not only was a notice given and a hearing had (203 U. S. at p. 337), but the laws of Mississippi expressly provided that

> "* * * Railroads must be given ten days' notice of the time and place at which any revision of its tariff of charges or complaint concerning the same, will be considered. In all other cases of complaint against a railroad or other common carrier, the Commission shall give the party complained of such reasonable notice as it may adjudge proper, but not less than five days. In other cases where notice is given, or required to be, or is proper to be given to any railroad or other common carrier, five days' notice shall be sufficient; but where anything is required to be done, such reasonable time must be allowed therefor as the Commission shall deem proper." (Chapter 134, Section 4281 of the Annotated Code of Statute Laws of Mississippi.)

In Chicago &c. Ry. Co. *v.* Dey, 35 Fed., 866 (1888.) a hearing was had in pursuance of a statute of Iowa which expressly provided that

"before finally fixing and deciding what the original maximum rates and classifications shall be, it shall be the duty of the Railroad Commissioners to publish ten days' notice in two daily papers published in Des Moines, setting forth in such notice that at a certain time and place they will proceed to fix and determine such maximum rates and classification; and they shall at such time and place and as soon as practicable afford to any person, firm, corporation or common carrier who may desire it an opportunity to make an explanation or showing or to furnish information to said Commissioners on the subject of fixing such maximum rates and classification." (Section 17, Chapter 28, of Laws of Iowa, 22 General Assembly, 1888.)

In Northern Pac. Ry. Co. *v.* Keyes, 91 Fed. 47 (1898), an injunction was granted by the Circuit Court for North Dakota to restrain the enforcement of rates by a commission. The laws of Dakota of 1807, Chap. 115, Sec. 29 provided that the Commission should give notice before fixing rates:

"before finally fixing and deciding what the original maximum rates and classification shall be, it shall be the duty of the Commissioners of railroads to publish ten days' notice in two daily papers published in the state, setting forth in such notice that at a certain time and place they will proceed to fix and determine such maximum rates and classifications; and they shall at such time and place, and as soon as practicable, afford to any person, firm, corporation, railroad, railroad corporation or common carrier who may desire it, an opportunity to make an explanation or showing, or to furnish information to said commissioners on the subject of determining and fixing such maximum rates, fares and classification."

And the distinction between legislative resolution respecting the reasonableness of a rate enactment and a

subsequent judicial decree as to its reasonableness is further brought out in the language of Mr. Justice Harlan in San Diego Land & Town Co. *v.* National City, 174 U. S. at p. 754 (1899):

> "Such a question [*i. e.* the reasonableness of a rate] is always an embarrassing one to a judicial tribunal because it is primarily for the determination of the legislature or of some public agency designated by it."

In C. B. & Q. R. R. *v.* Jones, 149 Ill. 377, it was similarly said:

> "The power to regulate and control the charges of railroad companies or other agencies engaged in public employments is legislative, and not judicial."

In the case of Interstate Commerce Commission *v.* Cincinnati N. O. & T. P. T. Co., 167 U. S. at p. 499 (1897), Mr. Justice Brewer said:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

And again at p. 505 of the same opinion:

> "The power to establish a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function."

Thus it is quite apparent that this Court has repeatedly declared that the act of making a rate—operative *in futuro*—is a legislative act, whether that rate is made by a legislature or by a commission clothed with legislative authority.

Mr. Justice Field, in the Sinking Fund Cases, 99 U. S. p. 761, said:—

> "The distinction between a judicial and a legislative Act is well defined. The one determines what the law is, and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."

In Merrill *v.* Sherburne *et al.*, 1 N. H. 199 (1818), the Supreme Court of that State, in deciding that an act of the legislature awarding a new trial was unconstitutional, very clearly showed the distinction between a judicial judgment and a legislative enactment and said:

> "A marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules, upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, to compare the claims of parties with the laws of the land before established, is in its nature a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law, 'as a rule of civil conduct'; because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

Though the State law may provide for an appeal to the courts of the State from the rates fixed by the rate making agency, the decision of this Court in Mississippi R. R. Comm. *v.* Ill. Cent. R. R., 203 U. S., 335, is among others an express authority that the Federal Courts may, regardless of the appellate features of the State law, enjoin a confiscatory order of a Commission.

The language of the Circuit Court in Western Union Telegraph Co. *v.* Myatt, 98 Fed. at p. 345 is here in point:

> "Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice. It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and opinions of men having special knowledge of matters to be affected by proposed legislation constitute in any sense the exercise of judicial functions, or that such committees are judicial tribunals."

The Supreme Court of Nebraska, in Nebraska Telephone Co. *v.* State, 55 Neb. 627 (1898), emphasized this distinction between legislation making rates and the judicial inquiry respecting their reasonableness. A District Court of Nebraska issued a mandamus requiring the Telephone Company to furnish the *relator* with service at $3.00 per month. The Supreme Court of Nebraska held that the judgment of the District Court awarding the mandamus was void because it was an act of rate making, in other words of legislation. The Court said (p. 635):

> "The power—the jurisdiction—to determine what compensation a public service corporation may exact for service to be rendered by it we understand to be a legislative act and not a judicial function * * * fixing the compensation which public service corporations may charge for services to be rendered by them is legislating. It is law making."

In this Nebraska case the true nature of the act was ascertained. The act being non-judicial was void because performed by a judicial body.

Finally the Supreme Court of Appeals of Virginia has construed the Constitution of Virginia Sec. 155 (*b*) (Appendix, p. 10) and has declared that this section means that the Virginia State Corporation Commission has been clothed "for the regulation and control of public service corporations," *"with legislative, judicial and executive*

powers." Norfolk & P. R. Co. *v.* Commonwealth, 103 Va. p. 294 (1904). And this same construction was again put upon this section by the Supreme Court of Appeals of Virginia in *Winchester &c. R. Co. Commonwealth*, 106 Va. 264 (1906). Therefore if there were no decisions of this court upon the subject these decisions of the Supreme Court of Appeals of Virginia would be conclusive that the act of fixing rates was a legislative act. *Chicago Milwaukee &c. Ry. Co. v. Minnesota 134 U. S. 418 (1889.)*

That the final action of the Virginia State Corporation Commission, fixing the rate complained of, was a legislative act and not a judicial judgment has been shown. Our next proposition is the second above given:—

(*b*) **After such rates have been determined upon, the action of the State Corporation Commission looking to their enforcement is ministerial or administrative in character, is no longer legislative in character and is not judicial in character and is not the enforcement of any judicial judgment or decree of a court.**

The proposition that the question of the reasonableness of a rate is a judicial one is supported by the following authorities.

In Chicago &c. Ry. Co. *vs.* Minnesota, 134 U. S. 418 (1889). Mr. Justice Miller concurring said (p. 459):

* * * * * * *

"3. Neither the Legislature, nor such commission acting under the authority of the Legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the Legislature or by the commission is such as to deprive a party of his property without due process of law."

In Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362 (1894), Mr. Justice Brewer, for the court, said (p. 397):

"The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates.

"The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; * * * *but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be,* to *restrain* its operation."

See also to the same effect:—

Interstate Commerce Comm. *v.* Cincinnati &c. Co., 167 U. S. p. 479 (1897) wherein this court held that the Interstate Commerce Commission had no power to legislate and establish future rates. The power of declaring rates fixed by the railroads to be reasonable or unreasonable was held by this court conferred upon the Commission, but no future power was given.

"The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative." (p. 501.)

Southern Pacific Co. *v.* Board of R. R. Comrs., 78 Fed. at p. 245 (1896).

Mr. Justice Brewer in Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 362, said:—

> "There can be no doubt of their (*i. e.* the Courts') power and duty to inquire whether a body of rates prescribed by a legislature or a Commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

This distinction is recognized by other Federal decisions.

In Southern Pacific Co. *v.* Board of Railroad Commissioners, 78 Fed. 236, above referred to, the Constitution of California provided for the election of Railroad Commissioners with the power and duty as set forth in the opinion of Mr. Justice McKenna, then Circuit Judge said (p. 244):

> "(1) To establish rates of charges for transportation of passengers and freight by railroad and other transportation companies, and publish the same from time to time, with such changes as they may make. (2) To examine the books, records, and papers of all railroad and other transportation companies, and for this purpose they shall have the power to issue subpœnas and all other necessary process. (3) To hear and determine complaints against railroad and other transportation companies, to send for persons and papers, to administer oaths, take testimony, and punish for contempt of their orders and processes, *in the same manner and to the same extent as courts of record*, and to enforce their decisions and correct abuses through the medium of the courts. (4) Said commissioners shall subscribe (? prescribe) a uniform system of accounts to be kept by all such corporations and companies."

And it was held, that, under these provisions, the California board of railroad Commissioners is invested with administrative, as well as judicial and legislative powers; and its duties are not so far discharged by the adoption

and service of a schedule of rates as to leave nothing further to be done, and to put it beyond the jurisdiction of a Federal court, in proceedings to restrain the enforcement of an unlawful determination.

The language of the Court is here pertinent

> "* * * the purely legislative functions of any official body cannot be controlled by the courts, but in the case of railroad commissions, the Supreme Court of the United States has distinguished executive from legislative functions, and has asserted the power to restrain the latter when their attempt is to enforce a tariff of rates which may be unjust and unreasonable. Railroad Commission Cases 116 U. S. 307 * * * Reagan *v.* Trust Co. 154 U. S. 362 * * * We are brought back to the inquiry concerning the duties which are devolved on the board of commissioners, and these we have seen, are not only to enact provisions of regulation of rates, but to enforce them; and hence, certainly when the former is done and the latter is threatened, the courts have power to review the regulation, and to use Mr. Justice Brewer's words, 'condemn or sustain this act of *quasi* legislation.'"

This case was cited with approval by Mr. Chief Justice Fuller in delivering the opinion of the Supreme Court of the United States in McChord *v.* L. & N. R. Co. 183 U. S. 483. In referring to this case he said (p. 497):—

> "In Southern Pacific Company *v.* California Railroad Commrs., 78 Fed. 236, the law of California provided that the commissioners might 'enforce their decisions, and correct abuses through the medium of the courts;' and, in substance, that after the rate was made by the commission, a copy of the order should be served on the corporation affected thereby, and that twenty days thereafter the rate should take effect. A bill was filed before the twenty days had expired; and Mr. Justice McKenna, then Circuit Judge, held that it was the duty of the commissioners to enforce the rate, and that an injunction would

lie. The railroad commission had made an order reducing the grain rates of the company 8 per cent., and had passed a resolution declaring that its general charges were 25 per cent. too high, and that 'this board proceed at once to adopt a revised schedule of rates in accordance herewith, in order that the same may be in force before January 1, 1896.' The court enjoined the enforcement of the 8 per cent. reduction, which had already been made, but declined to restrain the 25 per cent. reduction, because no decisive action had been taken."

In the case, Louisville & Nashville R. Co. *v.* Brown, *et al.*, State Railroad Commrs., 123 Fed. 946 (1903), the Circuit Court for the Northern District of Florida enjoined the Railroad Commission of Florida from putting a confiscatory tariff of rates into effect. The suit was held not to be one against the state or "to stay proceedings in any Court of a State."

Pardee, Circuit Judge, said:

"* * * An inspection of the act of the Legislature of the State of Florida creating the railroad commission shows that, as is usual in such cases, the commission is vested with executive, legislative and *quasi* judicial powers, but does not show that the commission is to any degree created and established as a court for the final adjudication and determination of the rights of individuals or the rights of property."

Laws of Florida of 1899, p. 76, Chap. 4700, Secs. 21 and 22 provide:—

"SEC. 21. Said Commissioners may at their discretion, cause to be instituted in any court of competent jurisdiction in this State, by the Attorney-General, State Attorney or Special Counsel, in the name of the State, proceedings by or for *mandamus*, injunction, mandatory injunction, prohibition or *procc-*

> *dendo*, against any such company or common carrier subject to the provisions of this act, or against any officer or officers, agent or agents thereof, to compel the observance of the provisions of this act, or any rule, rate or regulation of the commissioners made thereunder, or to compel the refunding of any moneys exacted in violation of any of the provisions of this act. And said Commissioners are hereby given and granted full authority to do and perform any act or thing necessary to be done to effectually carry out and enforce the provisions and objects of this act."
>
> "SEC. 22. The said Railroad Commissioners are hereby vested with judicial powers to do or enforce or perform any function, duty or power conferred upon them by this act to the exercise of which judicial power is necessary."

(Re-enacted into the General Statutes of Florida of 1906 as Sections 2921 and 2922.)

In a recent decision of this Court the effect of certain provisions of the Mississippi Code of 1892 was judicially determined. Mississippi R. R. Com'n *v.* Illinois Central R. R., 203 U. S. 335 (1906). Though the provisions of the Mississippi Code of 1892 and of the Virginia Constitution are not identical in all respects there are a sufficient number of identical provisions to render that decision relevant to the issue raised in the present cases whether the Virginia Corporation Commission is a court. The Mississippi Commission contended that

> "because the Commission having made an order to stop the trains would have to resort to the proper State court to aid it in the enforcement of its order thereby the whole proceeding must be regarded as in a State Court from the commencement." (Page 341.)

This court in its opinion delivered by Mr. Justice Peckham overruled that contention. In overruling it the opin-

ion not only decided the point that the power of a Commission to enforce its orders by application to the courts of a State does not render the proceedings before such a Commission judicial from their inception, *but also the point that the proceedings while before the Mississippi Commission were not judicial in character.*

> Mr. Justice Peckham: * * * "Whatever may be the provision in the State statute in regard to the enforcement solely by the State Court of the order of the railroad commission, *the proceeding while before the Commission never thereby became a proceeding in a State Court, and the jurisdiction of the Federal Court to enjoin the Commission from the enforcement of its order because such order was a violation of the Federal Constitution was not in the least affected.*"

Let us compare the provisions of the code of Mississippi with those of the Virginia Constitution.

True the Mississippi Code of 1892 *went no further than to require a notice and hearing before an order was made (Sec. 4281);* and to make the findings of the Commission *prima facie* evidence (Sec. 4284); while the enforcement of those orders could only be effected by application to a Mississippi Court (Sec. 4286).

In the cases at bar the Virginia Commission has after notice and hearing made an order upon the appellees.

The enforcement of that order, of that purely legislative act, by the ministerial act of publication was enjoined in the Court below. Nothing of a more judicial character had been done or attempted by the Virginia Commission than by the Commission of Mississippi.

If in this Court the Mississippi Commission's order was not regarded as the proceeding of a judicial Court of Mississippi no reason appears why the same view should not be taken of the order of the Virginia Commission.

There is no possible basis of differentiation except that the Virginia State Corporation Commission is authorized to punish the violations of its own orders upon notice and

hearing. (Constitution of Virginia, Sec. 15 (c); Appendix, p. 13.)

But as the bills were filed and the injunctions granted by the court below before any such enforcement of the order fixing rates had been begun by the Commission we contend that whatever might be or might not be the character of that as yet unattempted procedure the Mississippi decision controls these cases at bar.

Surely, we submit, the possibility of future action, which, granting only for the sake of this present argument would be judicial action, cannot differentiate the two cases.

This we submit is no valid basis of distinction between the two cases for the reason that what might or might not be the function of the Virginia Commission when entertaining proceedings upon the non-compliance with its orders no such question here arises.

Therefore, we submit that the decision of this Court in the Mississippi case in the language of Mr. Justice Peckham is applicable to the status of the Virginia Commission at the time the injunction was granted.

The publication or announcement that a Railroad Rate has been established by a State Legislature or a State Railroad Commission is not part of the Act of Legislation but is an administrative Act and may be enjoined when the rate itself is unconstitutional.

[Answering the 7th Ground of the Demurrer to the effect that this court has no jurisdiction to hear and determine this cause, for the reason that, if said Commission is not such a "court" as this court is without power to enjoin, then the publication of said Commission's order of April 27th, 1907, was a necessary part of the enactment of the same as legislation, and this court is equally without power to enjoin legislation before it is enacted.]

By reference to the Order of the Commission made April 27, 1907 the rate complained of, was ordered to be

put into effect on and after July 1st, 1907, and the order concluded with this:

> "It is ordered that the Clerk of the Commission do forthwith publish this order in full in one of the newspapers of general circulation published in the City of Richmond once a week for four consecutive weeks as required by law."

See order of the Commission set forth in the Bills of Complaint. (Appendix p. 2.)

All the Bills of Complaint pray that an injunction may be issued, substantially to the following effect:

> "enjoining and prohibiting the defendants, Beverley T. Crump, Henry C. Stuart, and Joseph E. Willard, constituting the State Corporation Commission of Virginia, and each of them individually, and jointly, as constituting said State Corporation Commission of Virginia, and each and all their successors in office, from publishing, or having published, in any newspaper published in the City of Richmond, Virginia, the said order of the State Corporation Commission, bearing date the 27th day of April, 1907, in respect to passenger rates, and from taking any other step or steps whatsoever under the Constitution or laws of Virginia, to enforce the requirements of the said order, or so as to hinder or prevent the complainant from increasing its passenger charges, to the extent that such increase may be fair, reasonable and just, and enjoining and prohibiting the defendant, R. T. Wilson, Clerk of the State Corporation Commission, and his successors in office, from publishing, or having published, the said order of the Commission in any newspaper published in the City of Richmond, Virginia, and enjoining and prohibiting the owner, proprietor, manager, or agent of any such owner, proprietor or manager of any newspaper in the City of Richmond, Virginia, from publishing or having published under the direction of the Commission, or the clerk thereof, such order of the Commission;

and that the requirements of the said order of the Commission, and each and every provision of the said order, be declared to be unreasonable, unfair and unjust to the Complainant, and unconstitutional, null and void." (Record No. 270 p. 19, No. 271 p. 35, No. 272 p. 12, No. 273 p. 17, No. 274 p. 22, [illegible] p. 20.)

The Temporary Restraining Order in all the cases is substantially to the following effect:

"1. That the defendants, Beverley T. Crump, Henry C. Stuart and Joseph E. Willard, constituting the State Corporation Commission of Virginia, and each and all of their successors in office, their and each of their servants, agents and employees, be, and they are, hereby restrained and enjoined from publishing or having published, in any newspaper published in the City of Richmond, the general order of the State Corporation Commission bearing date the twenty-seventh day of April, 1907, in respect to passenger rates, in the bill in this cause mentioned, *and from taking any other step or steps whatsoever under the Constitution or laws of Virginia to enforce the requirements of the said order.*

"2. That the defendant R. T. Wilson, Clerk of the State Corporation Commission, and his successors in office, and his agents, servants and employes, be, and they are, hereby restrained anl enjoined from publishing or having published the said order of the State Corporation Commission in any newspaper published in the City of Richmond, Virginia.

"3. That the owner, proprietor, or manager, or agent of any such owner, proprietor, or manager, of any newspaper in the City of Richmond, Virginia, be, and each and every one of them is, hereby restrained and enjoined from publishing, or having published, under the direction of the State Corporation Commission, or of the Clerk thereof, such order of the State Corporation Commission." (Record No.

270 p. 62, No. 271 p. 44, No. 272 p. 20, No. 273 p. 24, No. 274 p. 103, No. 275 p. 76.)

At the conclusion of the hearing on the Rule to show cause why an injunction *pendente lite* should not be granted the Circuit Court delivered an opinion and decision on July 10, 1907, to the following effect:

> "Under these circumstances, this court has jurisdiction to restrain the defendants from publishing and enforcing the rates which have heretofore been prescribed and established by said Commission. The acts sought to be restrained being purely ministerial in their character * * * For the reasons herein stated the restraining order heretofore granted will be continued until the final hearing."—(Record No. 270, p. 170, No. 271, p. 153, No. 272, p. 137, No. 273, p. 129, No. 274, p. 214, No. 275, p. 185.)

This ground of the demurrer is therefore to only so much of the prayer as relates to the publication of the order and therefore might be sustained, and the prayers of the Bills sustained as to every other part of the Bills and the injunction continued to restrain the enforcement of the order.

That portion of the order of the Commission ordering publication by the Clerk of the order of the Commission fixing rates:

> "*It is ordered* that the Clerk of the Commission do forthwith publish this order in full in one of the newspapers of general circulation published in the City of Richmond once a week for four successive weeks, as required by law," (See Appendix p. 6.)

to give effect to the order fixing rates, was certainly administrative in character, and, therefore could be enjoined by the federal courts where, as here, the enforcement by the Commission of the completed legislative act would deprive the complainant of rights under the Fed-

eral Constitution. The Court below has not enjoined the legislative proceedings of the Commission, but what the Court below has restrained is the enforcement of the unconstitutional administrative order directing publication to put in force the preceding, completed legislative act.

In this very order of the Commission ordering publication is a recognition of the fact that legislation had ended.

The Order of the Commission prescribing the Rate and ordering the publication was made April 27, 1907. The order of the Commission was a completion of their *quasi* legislative functions and was a finality on April 27, 1907. It then became a finality from the nature of the order itself and it is expressly made a finality as of that date by the Statute of Virginia (34) §1313 a, Ch 56 a, Pollard's Code Vol. 1 page 726:—

> "(34) That the Commonwealth or any party aggrieved by any final finding, order, or judgment of the commission shall have, of right, regardless of the amount involved, an appeal to the Supreme Court of Appeals the same to be taken and perfected within six months *from the date of such final* finding, order, or judgment, &c. * * * " (Appendix p. 42.)

Therefore from the character of the order and from the right of appeal the date of the order and not the date of completion of publication, establishes when *quasi* legislative functions of the Commission were completed and the enforcement of the order—the administrative functions of the Commission—commenced. Discretion was at an end and enforcement was beginning on the making the Order of publication of April 27th, 1907. The act of publication is therefore not legislative but is plainly ministerial.

All the bills were filed after the date of that order. In Chicago & Northwestern R. R. Co. *v.* Dey, 35 Fed. 866 (1888), Mr. Justice Brewer, then Circuit Judge, granted an injunction restraining the further publication

of a schedule of rates prescribed by the Railroad Commissioners of Iowa. Mr. Justice McKenna, when on the Circuit Bench, granted a similar injunction in Southern Pacific Co. v. R. R. Commission, 78 Fed. 236. Another case in which a similar injunction against a publication was made is the North Dakota Rate Case, 91 Fed. 47.

In the Dey case a question was raised as to the power of the Court to restrain the further publication of the schedule of rates prescribed by the Railroad Commissioners. As to this Mr. Justice, then Circuit Judge, Brewer, said:

> "Before closing, I must, however, notice two objections made by defendants: First, that the publication of this schedule is, of itself, no invasion of complainant's rights; that no immediate trespass is threatened, and therefore no injunction should issue. But equity interferes to prevent a multiplicity of suits, and where one act may be the foundation of many suits, courts have a right and it is their duty, in the first instance, to stay that act if unlawful. * * *
>
> * * * "A preliminary injunction will issue in accordance with the terms of the restraining order."

In all these cases the legislation of the States where these cases arose had legislation similar to that of Virginia requiring publication of the rates prescribed before they should become effective.

The following additional cases also decide that the publication of a legislative act is merely a ministerial or administrative act and is not part of the act of legislation.

In Minn. St. Ry. Co. v. Minneapolis, 155 Fed. at p. 992 (1907): The Circuit Court for the District of Minnesota held that publication of a municipal ordinance could be properly enjoined.

Lochren, D. J. (orally) (page 992):

> "It seems to me to be completed. It has gone through all the steps which the council would take in

the passage and enactment of an ordinance. * * * There was nothing further in the way of performance of any legislative function, it seems to me in respect to that ordinance. It is a completed ordinance. If it is constitutional, it is then a valid ordinance, although the operation of it is suspended until the publication, which would give notice to every person of the fact that such an ordinance was passed and is in existence. It seems to me this does not differ at all from what would be the case if an ordinance was passed, as acts of the Legislature are frequently passed, to take effect at a subsequent time. They are complete as far as legislative action can go at the time of the passage. There is no legislative action to be taken between that time and the time they go into effect; and there is no legislative action in this case, it seems to me, between the time when this ordinance was signed and approved by the mayor, the last legislative action in connection with it, and the time when it shall be, if it ever happens, published. That is merely a ministerial act, the publication of it, which I think * * * would devolve upon the clerk perhaps to pass the proper copy of it to the printer, and the printer to print it. The action of the clerk would not be legislative. The action of the printer would not. It would not be legislative at all, and it is not interfering, therefore, with legislative functions to grant an injunction at the present time and to enjoin the publication of it, because that is an act which puts it in force and puts the complainant in danger of it. * * * And therefore I hold that this suit is not prematurely brought, and that it is proper to restrain the publication of the ordinance, it having passed the legislative state."

See also—

Wolfe *v.* McCaull, 76 Va. 876;
Wise *v.* Bigger, 79 Va. 269.

The next contention of the appellees under point VII is

(2) That the Virginia State Corporation Commission is not a Court within the purview of Section 720 of the Revised Statutes of the United States.

In 1901 and at all times prior to the Virginia Constitution of 1902 this complainant and others similarly circumstanced enjoyed protection under the XIV Amendment from being deprived of their property without due process and could obtain that guaranteed protection by appealing to the Circuit Court of the United States on its chancery side, whenever, as in these cases there existed equitable grounds of jurisdiction.

Therefore upon this plea that the Commission of Virginia is a Court the general question must again recur whether under the Constitutional provisions and legislation of Virginia creating the State Corporation Commission a method has been successfully devised whereby a state by its action, and by its action alone, may paralyze and destroy the equitable jurisdiction of the Circuit Courts of the United States under the Constitution and laws of the United States to protect the rights of complainants under the Constitution and laws of the United States.

Revised Statutes Sec. 720 was originally enacted though without any different phraseology March 2nd, 1793 (Chap. 22, 1 Stat. L. 334):

> "The writ of injunction shall not be granted by any Court of the United States *to stay proceedings in any Court of a State*, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The legislative intention expressed by the above words—*to stay proceedings in any Court of a State*—is to be judicially ascertained by weighing all competent evidence on the subject.

Contemporaneous usage by Congress of the expression "*Court of a State*" leaves no doubt that Congress had in mind nothing but a court which administered justice,

whether of general or of special jurisdiction, according to the course of common law and the course of equity. A tribunal which both made the law by legislative fiat and in the same breath pronounced it reasonable would not be a Court proceeding according to the course of the common law and the course of equity.

A court where the magistrates passed upon the reasonableness of their own acts as legislators would not be a court proceeding according to the course of the common law and the course of equity.

A court taking jurisdiction by anticipation over a non-existing suit concerning a non-existing law would be a court taking jurisdiction over illusory or fictitious suits and not a court proceeding according to the course of the common law and the course of equity. This court in McChord *v.* Louisville & N. R. R. 183 U. S. 483 (1902) said (p. 502):

> "None of the consequences alleged to be threatened can be set up as the basis of equity interposition before the rates are fixed at all."

The act of Congress of May 26, 1790, was passed to give effect to Article IV of the Federal Constitution:

> "Full faith and credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

This Act of Congress of May 26, 1790, is now a part of Rev. Stat. Sec. 905 and is as follows:

> "The records and judicial proceedings of the Courts of any State or Territory, or of any such country shall be proved or admitted in any other Court within the United States, by the attestation of the Clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, Chief Justice or presiding magistrate, that the said attestation is in due form."

The conclusion seems to be quite plain that Congress in 1793 intended by the words, "proceedings in any Court of a State" what was intended by the words, "judicial proceedings of the Courts of any State" in 1790. In both those statutes and throughout the Judiciary Act generally, the meaning of the expression, "*court of a State*," is, such a court as administers the civil or criminal law of the State according to the course of the Common Law. We submit, therefore, that, if correctly interpreted, the words, "court of a State" in the Act of 1793 cannot refer to the administrative or executive acts of a body simply called a court. Such a body as this commission was not then known by the name of Court or by any other name. In fact such a body as this commission was unknown to the Common Law, to the equity jurisprudence, was not authorized by the Statutes of Virginia or of any other State; but, on the contrary the Constitutions of all the States (including that of Virginia of 1776 Article 3) declared such a body to be an impossibility.

> "3. The Legislative, Executive and Judicial departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than any one of them at the same time, except that the justices of the county courts shall be eligible to either House of Assembly."
>
> Revised Code of Virginia of 1819, page 34.

The words "*proceedings in any Court of a State*" as used in the Act of 1793 plainly did not apply to a State agency exercising other than judicial powers but only to a regularly constituted Court of Justice of a State when exercising judicial powers according to the course of the common law or the course of equity. The words were plainly not a prohibition against the enjoining by Federal Courts of the *non judicial* acts of a body like the Virginia State Corporation Commission in its exercise of mere executive or ministerial functions.

The Act of 1793 prohibited federal injunctions "*to stay proceedings in any court of a State.*" The prohibition therefore plainly was not designed to extend and therefore does not now extend to any functions not judicial in their character of any tribunal which would have been inconceivable because an unconstitutional function in the mind of the framers of the Act of Congress of 1793.

How can the State of Virginia by changing its organic law and by thus creating a tribunal which exercises powers forbidden to her Courts in 1793 (powers inconsistent at that date with the powers of every regularly constituted Court of Justice) change the meaning, operation and effect of the Act of 1793 (U. S. Rev. St. Sec. 720)?

Even the exercise by a regularly constituted court of justice of a state, of administrative or ministerial power or powers of a legislative character vested in it by State authority, does not make such an administrative or ministerial proceeding a suit within the meaning of section 720 of the Revised Statutes of the United States.

Thus the Virginia County Courts in 1793 exercised numerous functions which were not of a judicial character—such as laying taxes, case of the County Court Levy, 5 Call, 139 (1804); ordering the repair and building of public bridges, Brander *v.* Chesterfield Justices, 5 Call, 548 (1805); The Dinwiddie Justices *v.* The Chesterfield Justices, 5 Call, 556 (1805).

The Court of Appeals of Virginia in 1805 decided that these were *not* acts "of a judicial nature" and that therefore the justices of the County Courts were subject to the process of *mandamus* in respect to these functions which were styled by the Court of Appeals functions of "Commissioners of police."

If we assume that Congress was aware that legislative or administrative functions were exercised by the Courts of Virginia there was clearly no intention on the part of Congress to render those courts immune from Federal injunction, when they were exercising functions of "Com-

missioners of police" "foreign from those of a judicial nature," but only when exercising functions of a judicial nature. That such was the purpose of the enactment has been positively settled by this Court in Peck *v.* Jenness, 7 Howard, 612 (1849), where Mr. Justice Greer in construing and applying Section 720 said:

> "Where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it have once attached that right cannot be arrested or taken away by proceedings in another Court. These rules have their foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in another."

The foundation of Section 720 being in "comity" and "necessity" there is no basis for so applying Section 720 as to render a state court immune from federal injunction wth respect to their non judicial functions.

In re City of Chicago, 64 Fed. 897-899 (1894), Seaman, D. J., said:—

> "The power of taxation is legislative, and not judicial. Its exercise is not a judicial act, in any ordinary sense, 'and it cannot be exercised otherwise than under the authority of the legislature.' The county court is constituted the primary instrument for making the special assessment, and for hearing objections and making final determination, through a jury regularly impaneled. It is possessed of judicial powers, and hearings in these matters are conducted as in other cases at law, and the final action takes the form of a judgment. Does this constitute a 'suit,' in the sense of the statute giving jurisdiction to the federal courts? Considering the source of power, and that its exercise is legislative or administrative, and not judicial in its nature, I am of the opinion that it is not a 'suit,' within the federal jurisdiction. * * * To take jurisdiction in such case would be

to assume the exercise of the delicate power of taxation, and (employing the language of Mr. Justice Miller in Heine *v.* Commissioners, *supra*) would constitute 'an invasion by the judiciary of the federal government of the legislative functions of the state government.'

"Because the legislature saw fit to vest this power or duty in the county court, it does not follow that it would be thereby vested in any other court, and certainly not in a federal court, unless it is clearly a judicial power or duty. The language of Mr. Justice Field, in the concurring opinion in Meriweather *v.* Garrett, 19 Wall. 472, is well applicable here. After stating that taxes are not debts, but imposts levied for support of the government, or for special purposes authorized by it, and the consent of the taxpayer is not necessary to their enforcement, but they operate *in invitum*, and that the form of the procedure cannot change their character, it is there said:

> 'The levying of taxes is not a judicial act. It has no element of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. * * * Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom it shall be enforced.'

"* * * This is the initial proceeding for the assessment, which is placed in the county court. Although conducted under judicial forms, and in a court having judicial powers, I am of opinion that it is exclusively an administrative proceeding, and not cognizable by the federal court,—a court not contemplated by the legislature for participation in the assessment, and which has uniformly denied any function of taxation. 'The legislature makes, the execu-

tive executes, and the judiciary construes the law' (Wayman *v.* Southard, 10 Wheat. 1, 46); and it is only when the legislature or executive abuse their power that the judicial arm is extended for arrest of the abuse."

Another test whether or not the State Corporation Commission of Virginia is a Court within the meaning of §720 of the Revised Statutes of the United States and whether the proceedings commenced before it to fix a rate was in the nature of a suit, is whether or not such proceeding before the State Corporation Commission was a suit which could have been removed to the Circuit Court of the United States if the citizenship of the parties had been diverse. This question is settled by Upshur County *v.* Rich, 135 U. S. 467, which decided that a Court of West Virginia on which was imposed the duty of assessing taxes on appeal from an assessment did not act as a Court when it assessed taxes, but lost its judicial function, and therefore, such a proceeding was not a suit and was not removable to the Circuit Court of the United States.

Such a proceeding though conducted under judicial forms by a court of general judicial powers does not constitute a "suit" within the provisions for the removal of suits to the Federal Court.

3. That even if the Act sought to be enjoined were judicial and not administrative; even if the Commission were a court within the meaning of Section 720, the Commission, by the law of its creation, is not a valid constitutional body under the Constitution of the United States.

This position of the appellees may perhaps be more fully stated in the following way:

The State Corporation Commission of Virginia is not vested with the judicial attribute of impartiality.

It is not clothed therefore with one of those essentials of

a judicial tribunal which has been provided for and approved by the wisdom of successive ages.

It therefore lacks an essential attribute of a Court of justice proceeding according to the course of the common law and the course of equity.

It is therefore in no sense a court. It is merely an administrative agency of the state.

The Bill of Rights, Article I, Sec. 5 of the Virginia Constitution of 1902 recognizes and declares that there should be a separation of legislative, executive and judicial departments of the State.

> "SEC 5. That the legislative, executive, and judicial departments of the State should be separate and distinct; and that the members thereof may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by regular elections, in which all or any part of the former members shall be again eligible, or ineligible, as the laws may direct." (Appendix, p. 6.)

Contrary to this general principle an exception is made in the case of the State Corporation Commission by Article III, Sec. 39 of the Constitution of Virginia (Appendix, p. 7) with respect to the control of transportation and transmission companies. Legislative, executive and judicial powers may be exercised by the Commission in derogation of the general rule forbidding the combination of different powers in the same body:

> "ARTICLE III.—DIVISION OF POWERS.
>
> "SEC. 39. Except as hereinafter provided, the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercises the powers properly belonging to either of the others.

nor any person exercise the power of more than one of them at the same time."

The Virginia Commission is authorized to institute and prosecute its own proceedings before itself and such proceedings are to be heard, decided and its determination therein is authorized to be enforced by itself. Such a tribunal from its very nature is not a court, and such a tribunal cannot be made a court or the members thereof Judges by the declaration or enactment of a state in its Constitution or laws to that effect.

Taylor *v.* Place, 4 R. I. 324-335.
Auditor of State *v.* Atchison &c. R. Co., 6 Kansas 500, 506, 508.
Western Union Tel. Co. *v.* Myatt, 98 Fed. 335.
State *v.* Johnson, 61 Kan. 803 (1900).
McNeill *v.* Southern Ry. Co., 202 U. S. 543 (1906), *affirming*.
Southern Ry. Co. *v.* Greensboro Ice Co., 134 Fed. 82, 94.

To hold such an administrative agency of a state—a body that at the same time is the prosecutor and arbiter of its own cause, and enforces its decision in its own cause—to be a regularly constituted court of justice of a State would be contrary to the fundamental principles of the common law and of constitutional liberty.

Judge Cooley in his work on Constitutional Limitations (7th Ed) pp. 502, 504

"There is also a maxim of law regarding judicial action which may have an important bearing upon the Constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself' * * *

* * * * * * *

"It is a matter of some interest to know whether the legislatures of the American States can set aside this maxim of the common law, and by express enactment permit one to act judicially when interested in the controversy." * * *

* * * * * * *

* * * "We do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the State when framing their constitution, may possibly establish so great an anomaly, if they see fit."

But in a foot note he adds:—

"Even this must be deemed doubtful since the adoption of the fourteenth article of the Amendments to the Federal Constitution which denies to the State the right to deprive one of life, liberty or property without due process of law."

Blackstone says that

"a court is defined to be a place where justice is judicially administered. * * * In every court there must be at least three constituent parts: the *actor, reus,* and *judex;* the *actor,* or plaintiff, who complains of an injury done; the *reus,* or defendant, who is called upon to make satisfaction for it; and the *judex,* or judicial power which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to be done, to ascertain and by its officers to apply the remedy." 3 Bl. Com. 24-25.

Blackstone's definition was approved by Mr. Justice Story and by this Court in an opinion by Mr. Justice Brewer in Todd *vs.* United States, 158 U. S. 278 (1895):—

"A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law."

A court constituted so that a Judge could decide his own cause is repugnant to common right and reason.

In Bonham's Case, 8 Co. Rep. 112 (1609), the Court of Common Pleas, including Coke, Chief Justice, held that legally a patent could not authorize one body of men to make rules and orders and also to sit in judgment and impose fines for disobedience of those rules and orders.

Dr. Bonham was forbidden to practice medicine by the censors of a faculty of medicine created by a royal patent of Henry VIII, and this faculty of medicine and its board of censors was authorized by patent "to search, examine, correct and punish all offenders and transgressors" and to commit them to prison. Bonham was tried before these censors and found to be unfit to practice medicine. He continued to practice without a license and was fined and put into prison by these censors.

The Court in deciding the case said:—

> "The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia* (c) *aliquis non debet esse judex in propria causa, imo iniquum est aliquem suae rei esse judicem;* and one cannot be judge and attorney for any of the parties Dyer 3 E. 6. 65. 38 E. 3. 15. 8. H. 6. 19b. 20a. 21 E 47a., &c. And it appears in our books, that in many cases, the common law will (d) control acts of parliament and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void;" Bonham's Case. 8 Coke's Reports, 118a, Co. Litt. 141 a."

But one hundred and seventy odd years before Bonham's Case the question was presented to the Common Pleas whether the King had granted or could grant to the Chancellor of Oxford the jurisdiction to hear and determine pleas, to which the Chancellor was himself a

party. The Chancellor was sued in the Common Pleas in an action of trespass *d. b. a.* He had distrained the goods of the plaintiff to reimburse himself for repairing High Street in front of the plaintiff's house. The Chancellor claimed that the plaintiff's action should have been brought before the Chancellor himself by virtue of a Royal Charter giving cognizance of all pleas in Oxford to the Chancellor.

This case was argued in 1431 (Y. B. VIII H. VI Fol. 18, pl. 7) and the following brief extracts from the opinions show how inconceivable in the common law of England is the Continental doctrine of "Administrative Courts."

> MARTIN, JUSTICE: "When he is a party, he cannot be a judge impartial to himself." * * *
>
> BABINGTON, CHIEF JUSTICE "No one shall be his own judge except the King and still he gives his judgment by an intermediary, as by us and the other judges." * * *
>
> MARTIN, JUSTICE: "I think that he shall not have the jurisdiction, inasmuch as he is himself a party."
>
> BABINGTON, CHIEF JUSTICE: "It is unfitting that a man be his own judge as has been decided, and minister to execute his judgment, and that cannot be." * * *
>
> MARTIN, JUSTICE: "If jurisdiction be granted to a man where he may be a party, this grant is void unless it be specified that he can appoint another judge; for he cannot be his own judge; for if a fine be levied to a justice of this place and he the same takes jurisdiction, this fine is void."

In the City of London *v.* Wood, 12 Mod. 669, debt was brought in the Mayor's Court, (a court holden before the mayor and aldermen) on a bye law, to recover a forfeiture for refusing to serve the office of sheriff, and such action was brought in the name of the mayor and commonalty, and it was held to be error; and per Holt, C. J.,

> "What my Lord Coke says in Bonham's Case, in his 8 Co., is far from any extravagancy, for it is a very

reasonable and true saying, that if an act of parliament should ordain that the same person should be a party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature; but it cannot make one who lives under a government judge and party."

"The Mayor of Hereford was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment though he by the Charter was sole judge of the Court. Per Holt, C. J. 1 Salk 396."

See also Earl of Derby's Case, 12 Coke's Reports, 114.

In the proceedings before the Virginia Corporation Commission the instigator of the proceedings—the *actor*—is the Commission itself. The Attorney General does not represent the Commonwealth. He may only do so when requested by the Commission.

Pollard's Code, Sec. 3204, provides as follows:—

"He shall appear as counsel for the State in all cases in which the Commonwealth is interested, depending in the supreme court of appeals, the Supreme Court of the United States, the district and circuit courts of the United States for the State of Virginia, and the circuit court of the city of Richmond; and shall also, when requested by the State corporation commission, appear as counsel in any matter or proceeding pending before the said Commission as a court of record; and he shall discharge such other duties as may be imposed by the general assembly." (1877-8, p. 174; 1902-3-4, p. 643.)

The two above mentioned decisions rendered concerning the Kansas State "Court of Visitation"—the first in point of time having been rendered by the Circuit Court of the United States for the District of Kansas—Western Union Telegraph Co. *v.* Myatt, 98 Fed. 335 (1899), and State *v.* Johnson, 61 Kan. 803 (1900) may be here examined with profit.

The Circuit Court thus brushed aside the contention that the appellation of "a Court" conferred by the law of Kansas made the Court of Visitation a court of a State within the meaning of R. S. Sec. 720 (p. 355):—

> "It cannot be said, that, because a board or tribunal is denominated a court by the law creating it, all inquiry as to its true character is precluded, and that it must be conclusively assumed to be a court, whether rightly so or not."

And that Circuit Court of the United States held that no tribunal could be created by State law so as to constitutionally exercise due process of law under the XIV Amendment where legislative and executive functions are blended in the same body, saying (p. 360):

> "A proceeding in the court of visitation to determine judicially the validity and reasonableness of a body of rates established by it in the exercise of its legislative functions is not due process of law, within the meaning of the fourteenth amendment to the federal constitution. An active, potential agency of the legislative power of a state cannot be empowered to sit in judgment upon the validity of its own enactments, and to enforce its decrees with reference thereto by the exercise of the extraordinary powers of a court of chancery."

And again at p. 352:

> "It is not a proper judicial function to engage in the determination of the validity of contemplated legislative action, or in advance of a controversy aris-

ing thereunder, nor to undertake a collaboration with legislative or administrative bodies in the formulation of a schedule of reasonable rates to be charged by public service corporations."

Telegraph Co. *v.* Myatt, 98 Fed. 335 was adopted and followed by the Supreme Court of Kansas in State *v.* Johnson, 61 Kansas 803, 60 Pac. Rep. 1068.

The Supreme Court of Kansas in deciding State *v.* Johnson said:—

"The statute under consideration is skillfully constructed to confer legislative power upon the court of visitation to fix rates. This deposit of authority, when exercised, is made to take the form of a decree in chancery; indicating that it is the result of a decision after a contest in court between a plaintiff and defendant. In Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 862, 4 Sup. Ct. 192, 28 L. Ed. 297, it is said: 'A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce in its own appropriate way the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation.' This tribunal possesses the extraordinary power of proclaiming in its decrees in a suit, in the name of the state (which is not interested as shipper) and the railroad company, schedules which are made conclusive in the future. And any future controversy which might arise between the shipper and the railroad company has thus been prejudged and determined. Here is found a combination of the legislative and judicial functions,—the legislative power of fixing a schedule of maximum rates in respect to services to be rendered in the future by the railroad company to a private shipper, and the judicial power by which a rule for the first time promulgated by that court as to what shall be reasonable rates, by decree and execution thereof, is enforced upon the railroad company, so that, when a controversy does actually arise between a shipper and a

railroad company as to whether a charge for the service performed be reasonable or not, such controversy has been prejudged and settled, not in an action between the parties themselves, but in a proceeding in which the state has undertaken to prejudge and determine this question, and settle the rule of conduct to be binding upon the railroad company as to future controversies with private persons. In the usual process of making laws and providing for their enforcement, there is an interim between their enactment and their execution, affording opportunity for thought and preparation by persons affected. Here no time is lost. When a freight rate is established by this court, it goes forth with judicial sanction of reasonableness stamped upon it, and by a chancery decree a fixed rate is promulgated, and simultaneously its fairness judicially determined. Thus the victim first learns of the existence of law by reading a decree enacting it, in which he is condemned for its infraction. In Nebraska Tel. Co. *v.* State, 55 Neb., on page 637, 76 N. W. 174, the following pertinent language is used: 'Fixing the compensation which public service corporations may charge for services to be rendered by them is legislating. It is lawmaking. The power of the courts is limited to declaring what the law is, and they are precluded by the constitution from performing legislative functions; and though the courts of the land have from time to time declared laws fixing the compensation which public-service corporations might charge for services to be rendered by them void, because the compensation fixed by the law was unreasonable, in that the enforcement of the statute would confiscate the corporation's property, and thereby deprive it of its property without the due process of law, we know of no court which has ever claimed that it had authority to determine what compensation would be a reasonable one for a service to be performed by such corporation.'

"* * * It is one thing to determine whether a freight rate is reasonable, in a controversy between

> a shipper and a carrier, and another thing to decide, at the suit of the state or a private party, what shall be charged in the future for such services. A decision made in the first case might be a precedent when a similar controversy subsequently arose; but the promulgation of the first decision, however, formally done by a judicial tribunal, could not have the far-reaching effect of a legislative act, for it is peculiarly within the province of the legislature to regulate future conduct. * * * Judge Cooley, in his Constitutional Limitations (page 108), notes the distinction between legislative and juicial power, and says: "The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law. And it is said that that which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is, in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be, for the regulation of all future cases falling under its provisions."

In *In re* Ziebold, 23 Fed. 791 (1885) the Circuit Court of the United States for the Eastern District of Kansas in an opinion by Foster, D. J., held that a statute of that State violated the guaranty of due process in that a prosecuting attorney was vested with the judicial power of issuing subpœnas and punishing for contempt.

> "The judicial powers conferred on him by this law are not to hear and determine matters in which he stands indifferent between the parties, but are given to aid and assist him in the performance of his ministerial duties, and have no other purpose, making the judicial powers auxiliary and subordinate to the ministerial duties, and are given to him as a means by which he can more successfully procure evidence to institute and carry on prosecutions, and in this respect the powers given him are very great and in the hands of an unscrupulous man stimulated by animosity or avarice could be used as an instrument

of sore oppression. * * * This is a strange combination of judicial and ministerial duties aided with rewards and penalties and, so far as I have been able to ascertain, is an anomaly to all the judicial proceedings known to the land. It attempts to unite the judicial with the executive branch of civil government, and when the law-making power and the power which declares and applies as well as that which executes and administers the law, are united and vested in one person or body, it becomes a despotic and not a constitutional government."

The Supreme Court of New Hampshire in *In Re* School Law Manual, 63 N. H. 574 (1885) decided that an act of the legislature of that State authorizing the Supreme Court to approve or disapprove of the rules &c. contained in a School Law Manual to be submitted to the Supreme Court by certain commissioners appointed "to revise, codify and amend the statute law of the State relating to schools," was unconstitutional because it was an attempt to confer legislative powers on the judicial department.

DOE, C. J.:—

"Our approval or disapproval of the rules and forms submitted by the Commissioners would be advice given upon the question of their legal sufficiency. Binding neither the advisers nor the advised it would be given to the public presumptively for the guidance of persons whose action based upon it, would furnish an occasion for contesting, before us, the soundness of our advice. The inability of a judge to be of counsel to any party in matters brought before him as judge * * * results from an application to certain facts of a general and fundamental principle that disables a juror or other judge needlessly and unreasonably to do anything inconsistent with the inherent impartiality of his office. 33 Conn. 586, 587; 10 Minn. 78. This principle, established by the universal sense of justice, and adopted by the common law, is by necessary implication included in the constitutional meaning of a judicial branch of government."

In Norwalk Street Ry. Co.'s Appeal, 69 Conn. 576 (1897), the Supreme Court of Errors of Connecticut decided that an act of the legislature was unconstitutional as attempting to confer legislative functions upon the judicial department.

An "appeal" so called to the Superior Court was granted from the action of the municipality in approving or rejecting the plans for the location, construction and operation of a street railway. It was held that the Statute was unconsitutional for the reason above stated.

One passage of the opinion is very pertinent: (p. 594);

> "One controlling consideration in deciding whether a particular act oversteps the limits of judicial power, is the necessary inconsistency of such acts with the independence of the judicial department, and the preservation of its sphere of action distinct from that of the legislative and executive departments. A main purpose of the division of powers between legislature and judicature, is to prevent the same magistracy from exercising in respect to the same subject the functions of judge and legislator. This union of functions is a menace to civil liberty, and is forbidden by the Constitution. There is no intrinsic difficulty in recognizing a plain infraction of such prohibition. It is true that the different magistracies must act upon the same subjects; for every matter that may be dealt with by the State government may be acted on by each department thereof; but the action must be that belonging to the department whose powers are invoked."

Mr. Justice Miller in Kilbourn v. Thompson, 103 U. S. 168 thus insists upon the importance of preserving the boundaries between legislative, executive and judicial action:

> "It is believed to be one of the chief merits of the American system of written Constitutional law that all the powers entrusted to government, whether State or national are divided into the three grand

> departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."

And upon the same subject Blackstone has said:—

> "In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty."
>
> Bl. Comm. Bk I, Chap. 2.

and see in the present connection the decision of the Supreme Court of Nebraska in Nebraska Telephone Co. *vs.* State, 55 Neb. 627 (1898) previously cited in this brief.

The Supreme Court of Appeals of Virginia has likewise declared that it is of the essence of "Due process of law" that the tribunal should be impartial:—

In Violett *vs.* Alexandria, 92 Va., page 567 (1896), that Court said adopting the language of Mr. Lewis in his treatise on Eminent Domain:—

> "All the authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard *before an impartial tribunal* before any binding decree can be passed affecting his right to liberty or property."

In Western Union Tel. Co. *v.* Myatt, 98 Fed., 335 (1899), a question very similar to the present one arose. An act of the legislature of Kansas was passed in 1898 in part as follows:—

"An act creating a Court of Visitation, declaring its jurisdiction and powers, and providing for proceedings and procedure therein." * * *

"Section 1 creates the court of visitation, denominates it *a Court of Record*, and prescribes the qualifications of *the Judges* thereof. * * * Section 8 defines the power and jurisdiction of the court throughout the State to try and determine all questions as to what are reasonable freight rates, switching and demurrage charges, and other charges connected with the transportation of property * * * to apportion charges between connecting roads, determine all questions relating to charges for the use of cars &c. &c. &c. Section 9: *"The court shall possess full common-law and equity powers as to matters within its jurisdiction; may issue writs and process to compel attendance of parties and witnesses, the production of books, &c.; execute its decrees and orders, including writs of injunction and* mandamus, *and may appoint receivers to carry its judgments into effect;* shall have the same power to punish for contempt as district courts." * * *

This Kansas "Court of Visitation" had also power to enforce compliance with its orders and decrees by sequestration and the appointment of a receiver.

Provision was also made for an appeal. A preliminary injunction was granted against first the court of visitation, secondly against the complainant before that body and thirdly against the Solicitor for the State who had brought a proceeding to enforce obedience by the complainant to a maximum rate law fixed by act of legislature. The following extracts from the opinion of the Circuit Court deal with the objections made by the court of visitation to the suit for injunction:—

Hook, D. J.:—

"The legislature may, in the first instance, prescribe such regulations, and fix definitely the tariff

> of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals."

The following extract from this opinion is important in connection with the position taken by the appellees that denominating a State agency a "Court" does not make that agency a Court (p. 346):—

> "The fact that the legislature denominated the tribunal a court is not conclusive as to its true character, nor as to the nature of the jurisdiction and powers conferred upon it. That question is not determined by the terminology employed in the act, although the legislative purpose and intent may be evidenced thereby, but it is determined rather by the ascertainment of the essential nature of the jurisdiction and powers themselves. * * * The legislature may not create a court for the exercise of its own legislative functions, or for the performance of purely administrative or executive duties; and though a tribunal as constituted by legislative act, may be denominated a court, may possess a seal, and be

clothed with the usual and customary vesture of a judicial tribunal, yet its real character is determined by its jurisdiction and the functions it is empowered to exercise."

This federal decision was approved and followed by the Supreme Court of Kansas in State *v.* Johnson, 61 Kansas, 803; 60 Pac. Reporter, 1068.

The Federal authorities are therefore uniform to the effect that a statute styling a rate making and rate administering body a court does not create a state court within the prohibition of Section 720 of the Revised Statutes of the United States.

This Court has on several occasions recognized the right of a State by constitutional provision to unite for certain purposes two of the three powers of government in a single body or agency.

But in the cases where this court has permitted such commingling of powers by a State there were no such questions presented to this court as are raised in the present records.

The questions which these records present are,

1. Can the three powers of government be so vested in one tribunal (upon which the name of "Court" is conferred) that the long recognized and firmly established Federal Equity jurisdiction shall be ousted?

2. Can the three powers (the legislative, the executive and the judicial) be blended together and conferred upon a State agency to be exercised simultaneously by that agency with respect to the same subject matter?

Can this be done by a State without depriving the agency of that judicial impartiality which is one of the essential attributes of a Court?

3. Can the three powers of government be so conferred upon one State agency and exclusive jurisdiction given to that agency over a certain class of persons *i. e.*, those engaged in transportation and transmission, so that they are deprived of recourse to all courts of equity in cases where they require equitable relief and in cases where all other

persons have free access to Courts of Equity? Can this be done without denying to the transportation and transmission companies the equal protection of the laws?

POINT VIII.

The Appellees are deprived by the Constitution of Virginia of "The Equal Protection of the Laws."

In *Ex parte* Young (decided March 23, 1908) this Court emphatically announced the principle that a State may deny the equal protection of the laws by a system of imposing excessive fines and possible imprisonment for the violation of a confiscatory rate statute. The language of Mr. Justice Peckham is also a just criticism upon the unconstitutional effect of the obstructed appellate procedure of the Constitution of Virginia, in denying the equal protection of the laws:—

> "A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional."

Constitution of Virginia, Sec. 156 (b) provides (Appendix, p. 10.):

> "The commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all *transportation and transmission companies* doing business in this State, in all matters relating to the performance of their public duties and their charges therefor."
>
> "No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized) shall have jurisdiction to review, reverse, correct or annul any action of the Commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, re-

strain or interfere with the Commission in the performance of its official duties."

(h) * * * "In no such proceeding by any person against such corporation" *i. e.*, transportation or transmission companies, "nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge or classification of traffic * * * prescribed by the commission be questioned."

Transportation companies (including thereunder railroads, street railways, canal, steamboat or steamship companies) and transmission companies (including thereunder telegraph and telephone companies) are therefore, with the respect to the right to contest rates, put into a class different from that which includes all other public service corporations, as gas, electric light, heat and power companies and water companies.

To these latter companies the Courts of Equity are open. They may by bill in equity obtain in a proper case a preliminary injunction which will preserve the *status quo*, which will prevent a multiplicity of suits and thus be protected either by a Federal or State Court of Equity from having their property confiscated.

Upon what reasonable basis of classification is a railroad debarred from access to the very same courts of equity to which a gas or water company may have access for relief? Access is denied to the very same courts which the Supreme Court of the United States has said are alone "competent to meet such an emergency." Smyth *v.* Ames, 169 U. S. 466 (1898).

The large number of Federal and State Cases where equitable relief has been administered to all public service companies shows the impropriety of such discriminatory confiscation.

"The equal protection of the laws" is plainly denied unless the defective appeal clauses of the Virginia Constitution are an equivalent for the equitable jurisdiction of injunction upon entering such reasonable security as a chancellor may in his judicial discretion deem applicable in each particular case as it may arise.

The precise issue now presented may therefore be thus stated:

Does the classification of litigants by the Constitution of Virginia into two classes,

Class A—those who *cannot* enter courts of equity to prevent irreparable injury and a multiplicity of suits, including thereunder only transportation and transmission companies (see Constitution of Virginia, Sec. 156 (*h*)) (Appendix, p. 17), and

Class B—those who *can* enter courts of Equity for the relief above named including thereunder all other persons, natural or artificial whose rates may be regulated and prescribed by the legislature itself or the power to so regulate may be conferred by the legislature upon the corporation commission (Constitution of Virginia Sec. 156 (*c*) (Appendix, p. 12, 13.)

satisfy the Supreme Court's definition of a reasonable and proper distinction?

A classification, in the language of Mr. Justice Brewer in Gulf C. & S. F. R. R. *v.* Ellis, 165 U. S. 150 (1897), "must always rest upon some difference *which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.*"

Property is protected by the Federal Constitution without any discrimination between kinds of property.

The equal protection of the laws extends to all persons, and cannot be denied to any person.

The property of the stockholders who have invested in a railroad company is taken away by an unreasonable reduction of its tolls.

The property of the stockholders who have invested in a turnpike company, is taken away if the rates now prescribed by the legislature of Virginia, (See Turnpike Tolls in Pollard's Code of Virginia Vol. 1 p. 705 Sec. 1294-*j* (10) Vol. 1, p. 705) (Appendix, p. 60) amount to an unreasonable reduction of its tolls. But the stockholders of a turnpike company may under such circumstances, now

apply to the courts of chancery of Virginia, and the stockholders of the railroad Company cannot.

Where the tolls of canal, navigation and bridge companies are not prescribed by its charter "the commission shall fix such tolls as may seem to it reasonable, and may alter the same at its pleasure" (Act relating to Public service corporations Chap. 56-*A* (72); Pollard's Code Sec. 1313-*a* (72) Vol. 1, p. 736.) But if the tolls of a bridge company were made unreasonably low by the Virginia Corporation Commission the company would not be bound by the procedure of Sec. 156 (*d*) (*c*) of the Constitution of Virginia. The bridge company would be entitled to the protection of the Courts of Equity of Virginia. The prohibition of Sec. 156 (*h*) against collateral proceedings as to the validity of rates obviously applies only to those prescribed rates as to which an appeal is permitted—*i. e.*, transportation rates and transmission rates, it would seem, were not subject to judicial investigation, (156*h*) and not subject to appeal (156*d*). *For no appeal and no* supersedeas *as to rates is provided for except in the case of the rates of transportation companies,* (156 (*d*)).

That the Equity Courts of Virginia are vested with full chancery powers is apparent from the most casual inspection of the following authorities:

Heywood *v.* Covington, 4 Leigh. 401;
Switzer *v.* McCulloch, 76 Va. 777.

We therefore shall next present the decisions of the Supreme Court of the United States which bear upon the proposition that the Constitution of Virginia has made an unreasonable and arbitrary classification which works a denial of the equal protection of the laws.

The decision in Gulf, Colorado & Santa Fe R. R. *v.* Ellis, 165 U. S. 150 (1897) is plainly applicable.

By a statute of Texas all railroads were made liable to an attorney's fee of $50 if they unsuccessfully resisted in the courts any action for a debt or for damages to or overcharges upon freight or for the killing of live stock.

"The contention," said Mr. Justice Brewer, "is that it operates to deprive the railroad companies of property without due process of law and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations and requires them to pay in certain cases attorneys' fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made and only in certain cases."

This Court held, that the classification was arbitrary and denied to railroads the equal protection of the laws guaranteed by the Fourteenth Amendment.

In the judicial reasoning of Mr. Justice Brewer, underlying this judgment the following positions as to the tests of reasonableness in legislative classification are directly applicable to the case at bar:

"Such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, J., in State *v.* Loomis, 115 Mo., 307, 314 (21 L. R. A. 789). 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.'

* * * * * * *

"In Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. *232* the court, by Mr. Justice Bradley, saying on page *237*: 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.' * * * the fact of a limitation to such discretion was recognized.

"If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroad of all corporations are selected to bear this penalty. The rule of equality is ignored.

"It may be said that certain corporations are chartered for charitable, educational, or religious purposes, and abundant reason for not visiting them with a penalty for the nonpayment of debts is found in the fact that their chartered privileges are not given for pecuniary profit. But the penalty is not imposed upon all business corporations, all chartered for the purpose of private gain. The banking corporations, the manufacturing corporations, and others like them, are exempt. Further the penalty is imposed, not upon all corporations charged with the *quasi*-public duty of transportation, but only upon those charged with a particular form of that duty. So, the classification is not based on any idea of special privileges by way of incorporation, nor for special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties. * *

"* * * Statutes have been sustained giving special protection to the claims of laborers and me-

chanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency. * * *

"Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.

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Special Facts showing Deprivation of property of Appellees as will appear by the following synopsis of certain parts of the several Bills of Complaint.

(Referred to on page 15 of this Brief.)

THE CASE OF THE ATLANTIC COAST LINE RAILROAD COMPANY, APPELLEE IN NO. 270.

The bill of complaint in the case of this Appellee shows as follows (Record in 270, p. 9 to 15):

"The effect of the rates set forth in the said order of the Commission, and now proposed to be put into effect by it upon the business of this complainant, between points both of which are in the State of Virginia and which does not pass out of said State *en route* for the year ended June 30th, 1905, is as follows:

Complainant's gross total intrastate earnings in Virginia, from all sources, under the existing classifications, rates and charges, for the fiscal year which ended June 30th, 1905, were as follows:

Gross freight earnings		$133,419.31
" passenger "	$117,242.33	
" mail "	15,727.18	
" express "	19,698.87	
" miscellaneous "	22,311.71	174,980.09
Total gross intrastate earnings		$308,399.40
The minimum cost of earning this gross local or intrastate revenue is not less than 75 % of the total, which makes as a minimum cost applicable		231,299.55
Maximum net earnings from same (without deductions of taxes, cost of improvements and betterments not capitalized, or interest charges or dividends)		77,099.85
The taxes for the year ending June 30th, 1905, in Virginia, charged to and paid by		

complainant, were $47,223.26; of this sum 1% on the gross intrastate earnings, being the franchise tax thereon, and not less than two-thirds of the taxes on the physical property, are properly chargeable to the intrastate earnings, just as if complainant did no interstate business and had its lines built and equipped to do intrastate business only; such taxes to be deducted would be as follows:

Total taxes in Virginia paid, for year	$47,223.26	
Deduct the franchise tax paid for year	6,720.88	
Leaving taxes on physical and tangible property	40,502.38	
Two thirds of this, properly chargeable to intrastate plant and equipment is	27,001.59	
Add 1% franchise tax on gross intrastate earnings	3,083.99	
Taxes paid on intrastate property	$30,085.58	$30,085.58
Actual net intrastate earnings, after deducting taxes		47,014.27
Deduct reduction in revenue consequent upon proposed fixing of maximum passenger rate (intrastate) at two cents per mile by applying rate to intrastate passenger business in Virginia for year 1904–5		17,000.00
		$30,014.27
Add 1% franchise tax on amount of reduction of $17,000 in gross earnings		170.00
Balance total net intrastate earnings after paying taxes, if proposed reduction in pas-		

senger rates shall be put into effect (without paying any interest on bonded debt or dividends and without allowance for present increased cost of operation, or for any improvements or betterments)..... $30,184.27

The complainant further shows that the effect of the establishment of the proposed passenger rates and charges would not be limited to the intrastate business in Virginia of this complainant, but would inevitably affect the interstate business of this complainant, and impair and diminish the revenues derived therefrom. This inevitably follows from the fact that all, or nearly all, of its interstate passenger rates within the State of Virginia, are made, and necessarily made, on a combination of locals, or by the use of locals as factors, and, where the local rate within the State of Virginia is reduced, the inevitable effect upon its revenues of this complainant from its interstate business would be a reduction, and accordingly the total loss which this complainant would have to incur in the event that the proposed passenger rates and charges are made effective would not be represented merely by the figures above given, but a very considerable and appreciable loss would necessarily be added thereto, growing out of the reduction on its interstate business, as aforesaid.

The complainant further shows that there is, in respect to this complainant's property, as in respect to all other classes of property in the State of Virginia, whether owned by individuals or corporations, a difference between the commercial and tax assessment value, the commercial value being, in respect to all classes of property greater than the value assessed for purposes of taxation, and while this complainant does not admit, but, on the contrary expressly denies, that the tax assessment value is as great as the value which should be considered for the purpose of determining its right to make reasonable earnings out of and reasonable returns on, the property used by it in doing its intrastate business as a common carrier in Virginia, and performing the public service required of it as such, the

complainant is advised that the State of Virginia, having made the assessment for the purpose of taxation upon the complainant's property in said State, cannot deny that its property in that State is worth at least the amount of said assessment, and in fact, its property in Virginia is worth more than the amount of said assessment and it would cost more to reproduce it. If, however, the earnings which it can make under the proposed passenger rates and charges were estimated only in reference to the said assessed value of its said property, made by the State of Virginia for the purposes of taxation, the complainant avers that the proposed rates and charges will not permit it to earn reasonable profits and enjoy reasonable returns, even upon that valuation, and such rates and charges will deprive it of the legitimate use of its property.

Now the *ad valorem* assessment by the State of Virginia upon the physical property only of this complainant, for the year ending June 30th, 1905, was	$2,883,199.00
Not less than two-thirds of this represents the value of the physical property if built, equipped and used for intrastate business only, and is	1,922,133.00
The franchise tax of $3,083.99 on the intrastate gross earnings, capitalized at 35 cents on the $100, would produce	881,600.00
Total tax valuation for intrastate road	$2,803,733.00

Upon this tax valuation of $2,803,733.00 the net Virginia intrastate earnings of $47,014.27, for year ending June 30th, 1905, under existing classification and rates (no bond interest or stock dividends being allowed for) now yields complainant only 1.67⅔%; and, upon the same valuation, the Virginia intrastate net earnings, under the proposed passenger rates, being $30,184.27, above shown, would yield to complainant only 1.07⅔%.

If the franchise taxes on the interstate earnings, and only one-third of the taxes on physical property in Virginia, were

charged to the intrastate earnings, making the taxes charged against the intrastate road $16,584.78, and the intrastate net earnings $39,184.70, the result would be, upon the basis of the proposed passenger rates 1.39+% income only upon the value of the property as an intrastate road.

Complainant respectfully shows that, upon investigation, it will be found that practically the relative average values of the physical property essential to the conduct of intrastate and interstate railroad business is two-thirds for intrastate and one-third for interstate business—that is, a properly built and equipped road for intrastate business only will cost two-thirds of a sum sufficient to build and equip the same road for both interstate and intrastate business; and complainant further shows that, after making every proper and just deduction and allowance for the difference in value and cost of the physical properties, essential to operate an intrastate, and an interstate as well as intrastate, road, the allegation as to relative cost just hereinbefore made, is justified by the facts as to the property values and cost thereof of complainant in Virginia; and complainant shows that the cost of reproducing the physical property in Virginia of complainant, including rolling stock essential and used in 1905, and as the same was then made, equipped and used for both intrastate and interstate business, would be at least the sum of $5,549,221.33; and that the cost of reproducing the same, making due and fair allowance for difference under requisite requirements in all respects, for use and operation of an intrastate railroad only, would be at least $3,711,481.00, the figure last named being only $12,000.12 in excess of two-thirds of the above stated total cost of $5,549,221.33 for an interstate and intrastate road; and complainant further shows that it will adduce evidence proving the correctness of these estimates of cost and value.

And complainant further shows, that upon the basis last named of the cost and value of its physical property in Virginia, considered as an intrastate railroad only, the net revenue for 1905 from intrastate earnings (after the payment of taxes, but without paying any interest on bonds or divi-

dends on stock), under the present classification and freight and passenger rates is only 1.266%, that is on property value of $3,711,481.00, and net earnings of $47,014.27; and if the same property value be taken, and the net earnings of $30,184.27, under the proposed passenger rates be used, the net revenue to be yielded to this complainant will be only 81-100 of one per cent.

Complainant further shows, that if it owned no physical property in Virginia, except its road-bed and track of 128.07 miles, discarding all equipment and all other property the value of the same at $10,000.00 per mile, (which is less than one-third of its actual valuation, including franchises, for taxation), would be $1,280,700.00, upon which the said net intrastate earnings of $30,184.27 would yield a net revenue of 2.35+%.

Upon all these various valuations the earnings, even at present rates and clasification, from complainant's intrastate business in Virginia, amount to very small and unreasonable percentages upon cost or value, and those percentages will be, as shown, still smaller under the proposed classification and rates, and this without allowing anything for payment of interest upon bonded indebtedness or dividends on stock. Neither of the returns is a reasonable profit upon the invested capital.

Complainant further shows (as of June 30th, 1905), that its mortgage bonded debt upon its physical property in Virginia was		$4,246,515.70
and that its fixed indebtedness by (4% and 7%) Certificates of Indebtedness (not secured by mortgage) is $4,939.91 per mile of its entire line, so that on its 128.07 miles in Virginia there is applicable		632,654.27
		$4,879,169.90
on which the annual interest charge is		
On the bonds	$207,420.59	
On the certificates, over	25,306.17	
		232,726.76

The earnings from intrastate traffic in Virginia should contribute its *pro rata* (17%) proportion to the payment of such interest charge, viz., the sum of..	39,563.55
but the total net earnings from intrastate traffic in Virginia at present rates, was only $47,014.27, and under the proposed passenger rates will be only.....	30,184.27
which will leave a deficiency of.....	$9,379.28
and leave no return whatever upon the stock.	

As of June 30th, 1905, the amount of stock of complainant, apportionable to Virginia upon the mileage basis is, at $10,900.38 per mile, and 128.07 miles, the sum of $1,396,011.67.

The complainant further shows that the figures given in this bill, in respect to the result on its revenues for the year ended June 30th, 1905, are in their net result fairly representative of past and future conditions, except that the operating expenses of the complainant have since June 30, 1905, increased relatively far more than its gross earnings, and that the net result will be even more unfavorable, and yield a still smaller relative return to the complainant than is here shown for the year ended June 30, 1905.

Figures given in this bill are, as will be noted, for the year ended June 30th, 1905. The reason similar figures are not given for the year ended June 30th, 1906, is that they have not as yet been accurately compiled, but the complainant asks leave in the progress of this cause to give similar figures for the year ended June 30, 1906, which complainant alleges will show practically the same confiscatory consequences of the said proposed passenger fares as are here shown for the year ended June 30, 1905.

The general commercial conditions in Virginia are prosperous; the transportation service rendered by the complainant in interstate transportation is large, and, at reasonable rates, the returns therefor to this complainant would be much greater.

The complainant further shows, that there will be no compensatory increase in the business of this complainant resulting from the proposed reduced rates, and that there will be no appreciable or substantial increase whatever in such business due to such reduced rates.

The lines of railway of this complainant have at all times been operated as economically as practicable, under the existing conditions, and its operating expenses have at all times, under the conditions confronting it, been as reasonably low in amount as they could be made by economical and judicious management, and it has not been possible, under the conditions existing, for the complainant to operate its road for less than it has been operated. In all respects it has confined its operating expenses, its taxes, its interest, and every other expenditure within the lowest and narrowest limit reasonably practicable under existing conditions.

The complainant further shows that its present rates in Virginia are not higher than a reasonable compensation for the service rendered by it to travelers on its lines, and are in no sense excessive or extortionate; that they are not unjustly, unduly, unreasonably or illegally discriminatory as between individuals, nor as between localities, and that they in no way violate any law.

That all of said maximum rates fixed by the proposed order of the State Corporation Commission are lower than a just compensation for the service rendered, and are lower than would afford this complainant a reasonable and just return upon the value of its property used in performing the services in return for such rates."

THE CASE OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY. No. 271.

The Bill of Complaint in the case of this appellee shows as follows (Record in 271, p. 18 to 22.):

"This complainant further shows that the effect of said reduction in its passenger rates, fares and charges so proposed to be put into effect by said order upon the business of this complainant, the movement of which is wholly

within the State of Virginia and which does not pass out of said state en route, for the year ending June 30, 1905, is as follows:

That the gross earnings of The Chesapeake and Ohio Railway Company in Virginia from all sources, both inter and intrastate for the year ending June 30, 1905, were		$8,411,329.06
The operating expenses in Virginia for said year were		5,382,066.29
Leaving net earnings from all sources in Virginia for said year the sum of		3,029,262.77
That its gross earning from intrastate business from all sources in the State of Virginia for said year were—		
From freight	$857,819.07	
From passenger fares, rates and charges	642,143.81	
From parlor cars and excess baggage	24,970.29	
From express	46,935.40	
From U. S. Mail	68,818.44	
From all other sources	43,226.67	
		$1,683,913.68

Whereas, under the application of the proposed order of the Commission, fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers, the result on the business of the same year would have been—

(25) From freight	$857,819.07	
From passenger fares, rates and charges	503,826.04	
From parlor cars and excess baggage	24,970.29	
From express	46,935.40	
From U. S. Mail	68,818.44	
From all other sources	43,226.67	
		$1,545,595.91

The maximum net earnings from said intrastate traffic in Virginia (arrived at by deducting from the gross intrastate earnings in Virginia the operating expenses incident to the carrying thereof, which is not less than 78.99 per cent. of such gross earnings for the year ending June 30, 1905), were $353,790.26

Whereas, under the application of the order of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers, said maximum net earnings would have been $215,472.49

But intrastate earnings in Virginia should contribute to the payment of taxes chargeable to Virginia not less than the proportion which said intrastate earnings in Virginia bear to the total gross earnings in Virginia, viz.: 20.02 per cent.

The total amount of taxes paid in Virginia for said year were as follows:

State	$139,814.22	
County	88,662.05	
Municipal	76,656.99	
		$305,133.26
20.02 per cent. of which is ..	61,087.68	

In like manner intrastate earnings in Virginia should contribute to the payment of reasonable betterments in the same proportion.

(**26**) The amount expended in Virginia during said year for such betterments and not charged to capital account was $708,154.82

of which 20.02 per cent. is $141,772.59

thus leaving as maximum net intrastate earnings in Virginia, after deducting taxes and reasonable betterments not capitalized, properly chargeable to said intrastate earnings the sum of 150,929.99

as follows:

Maximum net earnings as above from actual business in Virginia for year ending June 30, 1905		$353,790.26
Deduct taxes, 20.02 per cent. of $305,133.26	$61,087.68	
Deduct betterments, 20.02 per cent. of $708,154.82	141,772.59	
		202,860.27
		$150,929.99
Whereas under the application of the proposed order of the Commission, fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers, the maximum net earnings from said intrastate traffic would have been as aforesaid		$215,472.49
from which should be deducted such proportion of the total reduced taxes chargeable in Virginia as is applicable to intrastate traffic, in the ratio of the reduced intrastate gross earnings in Virginia to reduced total gross earnings in Virginia, being 18.68 per cent., to wit	$56,884.87	
and deducting the same percentage, to wit: 18.68 per cent. of reasonable betterments not capitalized, chargeable to Virginia during the same year, to wit	132,283.32	
		$189,168.19
Leaves maximum net earnings in Virginia		$26,304.30

(27) for the payment of interest charges and returns on the capital invested.

This complainant respectfully shows that there is in reference to its property as in reference to all other classes

of property in the State of Virginia, whether owned by individuals or corporations a difference between the commercial and the tax assessment value, the said commercial value being in respect to all classes of property greater than the value assessed for purposes of taxation; and this complainant does not admit that the tax value assessment is the value which ought to be considered for the purpose of estimating its right to make reasonable earnings on the property used by it, but this complainant is advised that the State of Virginia having made the assessment for the purpose of taxation upon this complainant's property in said State cannot deny that its property is worth at least the amount of said assessment; and if the earnings which it can make under the proposed classification, rates and charges are estimated only in reference to the said assessed value of its property made by the State of Virginia for the purpose of taxation, this complainant shows that the same will not permit it to earn a reasonable profit even upon that valuation, and will deprive it of the legitimate use of its property.

The total property value of the physical properties of this complainant, assessed by the Honorable State Corporation Commission, and upon which taxes were paid for the year ending June 30, 1905, was.....	$15,135,857.00
The franchise tax of $84,665.22, assessed by the Honorable State Corporation Commission, and paid by this complainant in the year ending June 30, 1905, capitalized at the same rate of taxation as that imposed upon its physical properties, to wit: 35 cents on the $100.00 shows a value of.....	24,190,000.00
Thus producing a total value of.....	$39,325,857.00

Taking 20.02 per cent. (the ratio which the gross intrastate traffic earnings in Virginia bear to the total gross traffic earnings in Virginia), thereof, the value of the property used in Virginia for intrastate purposes on the basis of Virginia assessment for the purpose of taxation is shown to be.....		$7,873,036.57

(**28**) Upon even this valuation the net amount earned by this complainant under its existing passenger rates, fares and charges from its intrastate business in the State of Virginia after deducting the proportion of taxes and betterments properly chargeable against such intrastate earnings, viz: 20.02 per cent. amounts to less than two per cent. from which said intrastate business in Virginia should pay its proportion of the interest on the bonds properly chargeable to its lines in Virginia, and dividends on its stock invested.

This complainant further shows that the total bonded debt applicable to its lines in the State of Virginia is.....	$45,631,920.16	
on which the annual interest charge is.....	$1,969,162.41	
and that the annual trackage and rentals paid for lines in Virginia by this complainant amounts to.....	15,863.80	
Total interest, trackage and rentals applicable to Virginia.....		$1,985,026.21
The maximum net earnings from intrastate traffic in Virginia should contribute its pro-rata proportion to the payment of such interest and rental charges in the ratio of intrastate net earnings from all sources in Virginia to total net earnings in Virginia, inter and intrastate, to-wit: 11.68 per cent., viz: the sum of....		231,851.06

But as hereinbefore shown the maximum net earnings from intrastate traffic in the State of Virginia under the existing passenger rates and charges, after deducting its proportion of taxes and betterments for said year, amounted only to the sum of..... $150,929.99

Leaving a deficit under the actual existing passenger rates, fares and charges of..... $80,921.07

The deficit under the application of the proposed order of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers, would have been not less than $121,580.15, shown as follows:

(29) As before shown, the total interest, trackage and rentals applicable to Virginia are..... $1,985,026.21

The maximum net earnings from intrastate traffic in Virginia should contribute its *pro rata* proportion to the payment of such interest and rental charges in the ratio of intrastate net earnings from all sources in Virginia under the proposed order of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers to the total net earnings in Virginia under the proposed order of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers, to-wit: 7.45 per cent., namely, the sum of.. $147,884.45

But, as hereinbefore shown, the maximum net earnings from intrastate traffic in the State of Virginia under the proposed order of the Commission fixing and prescribing a maximum rate or charge of two cents

per mile for the transportation of passengers after deducting its proportion of taxes and betterments for said year, amounted only to the sum of..... $26,304.30

Thus leaving a deficit as aforesaid of..... $121,580.15

and in the foregoing statements and calculations no account has been taken of, nor allowance made for, the net loss to this company growing out of or in any way connected with its investments in, or operations of, companies controlled by it or in which it may be interested.

This complainant further shows that the figures given in this bill, in respect to the result on its revenues for the year ended June 30, 1905, are in their net result fairly representative of past conditions, but are not fairly representative of future conditions for the reason that the operating expenses of this complainant have, since June 30, 1905, increased relatively far more than its gross earnings, and that the net result will be *given* more unfavorable, and yield a still smaller relative return to this complainant than is here shown for the year ended June 30, 1905.

The figures given in this bill are, as will be noted, for the year ended June 30, 1905. The reason similar figures are not given for the year ended June 30, 1906, is that they have not, as yet, been accurately compiled, but complainant asks leave in the progress of this cause to give similar figures for the year ended June 30, 1906, or 1907, which plaintiff alleges will show similar confiscatory consequences of the said proposed passenger fares as are here shown for the year ended June 30, 1905.

The complainant further shows that there will be no compensatory increase in the business of this complainant resulting from the proposed reduced rates, and that there will be no appreciable or substantial increase whatever in such business due to such reduced rates.

The lines of railway of this complainant have at all times been operated as economically as practicable, under the existing conditions, and its operating expenses have

at all times, under the conditions confronting it been as reasonably low in amount as they could be made by economical and judicious management, and it has not been possible under the conditions existing for the complainant to operate its road for less than it has been operated. In all respects it has confined its operating expenses, its taxes, its interest, and every other expenditure within the lowest and narrowest limit reasonably practicable under existing conditions.

* * * * * * *

"This complainant further shows that its present passenger rates, fares and charges are not higher than a reasonable compensation for the service rendered by it to the passengers and are in no sense excessive or extortionate and in no way violate any law. This complainant is advised that it has, as an incident of its property and as a property right, the right to charge for each service which it renders a reasonable compensation and this complainant is protected by the Fourteenth Amendment to the Constitution of the United States in making, receiving and collecting such charge.

The effect of the proposed order of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers, will be to materially reduce this complainant's charges and to reduce them greatly below what would be a reasonable compensation for the service rendered to the passengers.

* * * * * * *

This complainant further shows that many of its existing rates are lower than is just compensation for the service rendered, and have heretofore yielded, and will continue to yield to the complainant, much less than a reasonable return upon the value of its property employed in such service. Since they were fixed, the operating expenses of the complainant have, without its fault, been largely increased, the cost of equipment, of materials and supplies, and of labor, necessary for its operations, having all largely

increased, so that the net return to this complainant has become much less than it has heretofore been, and it is not now, and never has been, as much as this complainant is entitled to receive. All of said maximum rates fixed by the proposed order of the State Corporation Commission are lower than a just compensation for the service rendered, and are lower than would afford this complainant a reasonable and just return upon the value of its property used in performing the services in return for such rates, and that the effect of said order, because thereof, and also because said order undertakes to impose an immovable maximum, is to deprive this complainant of its property without due process of law, and of the equal protection of the laws, and to take its property without just compensation, contrary to the said Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which is again, in this regard, expressly set up and claimed."

THE CASE OF THE CHESAPEAKE WESTERN RAILWAY, APPELLEE IN NO. 272.

The Bill of Complaint of this appellee shows as follows (Record in *272*, p. 7):

"6. That the existing 3½ cent passenger rate upon this Complainant's line, between points in the State of Virginia, and applicable to intrastate business in said State, is not higher than is just and reasonable, whether considered in respect to the value of the property used by this Complainant in its said public intrastate business in Virginia, or in respect to the value of the services rendered to passengers by this Complainant.

That the said Order is an attempt to prevent the Complainant from charging and collecting a 3½ cent rate or any greater and reasonable rate.

That as an incident of its property, and as a property right, this Complainant has the right to charge and collect a reasonable rate; and that as much as a 4 cent rate is and would be reasonable on a short and small line such as Complainant's road.

* * * * * * *

7. That the effect of the 3 cent and 3½ cent and the 4 cent passenger rates upon the business of this Complainant, between points on its line, within the State of Virginia, and which does not pass out of said State *en route*, calculated upon the basis of business for the year ending June 30, 1906, would be as follows:

That the following figures are, Complainant is informed and believes in their net result, representative of future conditions, except that the net result may in the future be even more unfavorable to this Complainant, owing to the fact that operating expenses will in all probability increase, and, in the estimation of the Complainant, the reduced rate will not cause an increased revenue.

(A) Net earnings from intrastate business are about	$13,613.30
Gross earnings from intrastate business are 66.38% of whole gross earnings; and net earnings from intrastate are taken at 66.38% of the whole net earnings.	
(B) Gross intrastate passenger earnings were	24,892.91
Reducing the rate to 3c would cause a decrease of about	3,012.00
Therefore (A) net intrastate earnings would be only about	10,601.30
(C) If the 4c. rate is applied, there will be an increase, and the net (A) revenue from interstate business would be about	16,625.30
(D) Value of property of Complainant on which it should receive a reasonable return is	1,419,000.00
66.38% of this used in intrastate business is	941,932.00
On which at 3c. rate it would receive a net intrastate profit as above of which is .011% per annum (1-1/10%).	10,601.30

At 3½c. rate it would make..... $13,613.30
which is .015% per annum (1½%).
At 4c. rate it would make..... 16,625.30
which is .018% per annum (1-8/10%).

The passenger business represents 53.33% of the entire intrastate business of the road, and therefore a reduction in passenger rates is very serious.

That there is and should be, in respect to this complainant's property, as in respect to all other classes of property in the State of Virginia, a difference between the Commercial and the Tax Assessment Value; the Commercial Value being greater than the value assessed for taxation; and that the assessed value of the property of the Complainant for the purposes of taxation, though sufficiently large for that purpose, is not as great as the value at which the property should be considered in determining this Complainant's right to obtain reasonable returns thereon from its actual original investment, or in determining the value of the services rendered.

That the said road is 40.63 miles long, and is composed of eighty pound rails, laid on standard ties, supported mostly on stone ballast; that the Complainant has stations and freight depots a round house and machine shops, and switches; that it runs two round trip passenger trains, and one round trip freight train, each week day; and that it operates two passenger and two freight engines and 42 cars; that the road is worth $35,000 a mile, and the unpaid coupons on bonds, issued at that rate, add an investment of $300,000 besides.

That the Complainant has $1,419,000 of 4% bonds outstanding, on which the annual interest is $56,760, which has not been paid, or charged against earnings, and which has been in default since the bonds were issued in 1901; in 1907 for the first time it has been decided to charge its Profit and Loss Account with all interest on bonds to date, amounting to over $274,000.00, and as they shall mature, and to show the deficit therefor in the income account.

That against the earnings of the Road no salaries are paid or charged for President, Vice-President, or Secretary and Treasurer; and the net earnings from interstate business are about $6,894.84, and from intrastate are about $13,613.30; whereas the Complainant should be able to pay the officers reasonable salaries, and still net more than $56,760 each year on its entire business, that is 66.38% thereof, which is $37,677.28, should be earned on its intrastate business.

That 66.38% of $1,419,000, that is to say, $941,932 is less than the fair and reasonable value of the properties of the Complainant in Virginia used by it for the purpose of producing revenue in its intrastate business, and is less than a fair figure at which to set the value thereof, for the purpose of determining the rates that the complainant should be allowed to charge; and is less than a fair and reasonable figure to use in deciding what is the value of the service rendered by the Complainant to the public.

That this Complainant's road is operated as economically as practicable, and that it has not been possible, under the conditions existing, for the Complainant to operate its road for less than it has been operated. That the percentage of operating expenses and taxes to gross earnings, on intrastate business, was 70.85.

The maximum rate, fixed by the proposed order of the State Corporation Commission is lower than a just compensation for the service rendered and lower than would afford Complainant a just return upon the value of its property used in performing the service in return for such rate.

* * * * * * *

That the present 3½ cent passenger rate charged by this Complainant between points on its line within the State of Virginia, is not sufficiently high to give it a reasonable compensation for the service rendered by it to passengers on its line; that the Complainant's rates are not unreasonable, illegal or discriminatory as between individuals, or as between localities, and that they in no way violate any law.

* * * * * * * *

That the effect of the proposed rate ordered by the Commission would be to materially diminish this Complainant's revenues and to reduce them below what would be a reasonable compensation for its services rendered.

* * * * * * * *

That a 4 cent rate for intrastate passenger service, between points on the complainant's road, which are in the State of Virginia, would not be higher than would be just and reasonable, whether considered in respect to the value of the property used by this Complainant in its said public intrastate passenger service in Virginia, or in respect to the value of the services rendered to its passengers by this Complainant.

That said increase would not result in a decrease of the gross intrastate passenger earnings of the Complainant.

That the effect of the said Order, and the refusal of the Commission to allow an increase to 4 cents, as asked, is an attempt to prevent the Complainant from charging and collecting a 4 cent rate."

THE CASE OF THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLEE IN NO. 273.

The Bill of Complaint of this appellee shows as follows (Record in 273, p. 10 to 15):

"The existing passenger rates and charges in effect upon this Company's lines in the State of Virginia and applicable to intrastate business in said State are not higher than three cents per mile and are not higher than is just and reasonable, whether considered in respect to the value of the property used by this Complainant in the public intrastate service in Virginia or in respect to the value of the service rendered to travelers upon its lines.

"The complainant further shows that there is, in respect to this complainant's property, as in respect to all other classes of property in the State of Virginia, whether owned by individuals or corporations, a difference between the commercial and tax assessment value, the commercial value being, in respect to all classes of property, greater

than the value assessed for purposes of taxation, and while this complainant does not admit, but, on the contrary, expressly denies that the tax assessment value is as great as the value which should be considered for the purpose of determining its right to make reasonable earnings out of, and reasonable returns on, the property used by it in doing its intrastate business as a common carrier in Virginia, and performing the public service required of it as such, the complainant is advised that the State of Virginia, having made the assessment for the purposes of taxation upon the complainant's property in said State, cannot deny that its property in that State is worth at least the amount of said assessment, and, in fact, its property in Virginia is worth more than the amount of said assessment, and it would cost more to reproduce it. If, however, the earnings which it can make under the proposed passenger rates and charges are estimated only in reference to the said assessed value of its said property made by the State of Virginia for the purpose of taxation the complainant avers that the proposed rates and charges will not permit it to earn reasonable profits and enjoy reasonable returns, even upon that valuation, and such rates and charges will deprive it of the legitimate use of its property:

The *ad valorem* assessment upon the tangible property of the complainant in the State of Virginia for the year ending June 30, 1906, was	$1,052,863.00
The franchise tax and registration fee paid the State of Virginia for 1906, capitalized at the same rate of taxation imposed upon its tangible property, to-wit, 35 cents on the hundred dollars	$1,760,797 00
Thus making a total assessed value in Virginia of	$2,813,660.00
Complainant states that the actual cost of its road and equipment in Virginia to it as of June 30, 1905, was	$3,155,668.39

Complainant states further that it has had an estimate made of the cost of reproduction of its lines in Virginia, exclusive of rolling stock, by competent engineers, and that the estimated cost of reproduction of its lines in Virginia at this time in the condition they are now, exclusive of rolling stock and the present fair value thereof, is $3,251,272.50

Complainant states that its property in Virginia, including the necessary rolling stock and equipment used in the conduct of its intrastate business is at present time of the value of at least $577,257.00

Complainant states that for the year ending June 30, 1905, and which was the year involved in the investigation made by the State Corporation Commission of Virginia of its rates, fares and charges which resulted in the order for the maximum rate of two cents per mile, referred to hereinbefore its earnings and expenses in Virginia, and the return of profit upon the value of the property used in making such earnings were as set forth below. The complainant also shows below the effect upon its earnings, and the profit therefrom for the year 1905, if said two cent maximum rate as proposed in said order had been in force:

Gross earnings in Virginia on all business, State and interstate, freight, passenger and miscellaneous, for the year ending June 30, 1905 ..... $592,996.67

Operating expenses and taxes (81.08 per cent.) 480,790.43

Gross earnings from intrastate freight business in Virginia for the year ending June 30, 1905, were 42,714.18

Gross earnings from intrastate passenger business in Virginia for the year ending June 30, 1905, were 41,270.35

Total earnings from intrastate freight and passenger business		$83,894.53
The expenses of doing this business, assuming that State business cost the same as the average of all business, 81.08 per cent. of $83,984.53, equals		68,094.65
Net earnings		$15,889.88
If the passenger rates were reduced to two cents per mile, as proposed in this case, the actual loss in passenger earnings would be		11,456.65
This would leave net earnings on intrastate business in Virginia of		4,433.23
The cost of road and equipment in Virginia as of June 30, 1905, was		3,155,668.39
Assuming that such proportion of the value of the property was used in the conduct of intrastate business as the intrastate earnings are to the total earnings both State and intrastate, the value of the property used in the conduct of intrastate business would be 14.16 per cent. of the whole, or		446,842.64
On this sum the net earnings of $4,433.23 shown above are equivalent to		0.99 per cent
Gross passenger earnings in Virginia, both State and interstate, for the year ending June 30, 1905		100,808.06
Operating expenses and taxes (81.08 per cent.)		81,735.18
Net passenger earnings		19,072.88
The application of passenger rate of two cents per mile to strictly intrastate travel would cause a loss of	$11,456.65	
And in interstate business of	12,199.97	
Or a total loss of		$23,656.62

Leaving a deficit in the passenger operations of	$4,583.74
Based upon assessed value for the year 1906 the per cent earned on its intrastate business in Virginia in 1905 under a maximum rate of two cents per mile would have been:	
Assessed value	$2,813,660.00
14.16 per cent devoted to intrastate business	398,414.00
Net earnings	4,433.00
Per cent earned thereon	01.11
Based upon cost of reproduction, exclusive of equipment, the per cent earned on intrastate passenger business in Virginia for the year ending June 30, 1905, under the maximum 2 cents per mile passenger rate would have been:	
Cost of reproduction, exclusive of equipment	$3,251,272.50
14.16 per cent devoted to intrastate business	463,380.00
Net earnings	4,433.00
Per cent earned	0.95
The complainant states that the effect upon its business for the year ending June 30, 1906, if the proposed two cent per mile maximum passenger rate provided for in said order of the State Corporation Commission had been in force is shown in the tables below:	
Gross earnings in Virginia, on all business, state and interstate, for the year ending June 30, 1906	$656,709.34
Operating expenses and taxes (86.16 per cent)	565,820.91
Gross earnings from intrastate freight business in Virginia for the year ending June 30, 1906, were	46,219.21

Gross earnings for intrastate passenger business in Virginia for the year ending June 30, 1906, were		$59,652.56
Total earnings from intrastate freight and passenger business		$105,871.77
The expense of doing this business, assuming that state business cost the same as the average of all business, 86.16 per cent of $105,871.77 equals		91,219.12
Net earnings		14,652.65
If the passenger rate for the year ending June 30, 1906, had been two cents per mile, as in the proposed order, the actual loss on intrastate passenger earnings would have been		17,894.76
This would have caused a deficit on intrastate business in Virginia of		3,242.11
Gross earnings on passenger business in Virginia, state and interstate, for the year ending June 30, 1906		117,380.09
Operating expenses and taxes (86.16 per cent)		111,134.69
Net passenger earnings		16,245.40
If the maximum two cent passenger rate, as provided in the proposed order of the State Corporation Commission had been in effect in Virginia for the year ending June 30, 1906, it would have caused a reduction in the intrastate passenger business for the year of	$17,894.76	
And on interstate passenger business in Virginia of	17,557.80	
Or a total reduction of		$35,452.56

Thus causing a net deficit from the passenger operations in Virginia for the year ending June 30, 1906, of..... $19,207.16

This complainant further shows that many of its existing rates are lower than is just compensation for the service rendered, and have heretofore yielded, and will continue to yield to the complainant, much less than a reasonable return upon the value of its property employed in such service. Since they were fixed the operating expenses of the complainant have, without its fault, been largely increased, the cost of equipment, of materials and supplies, and of labor, necessary for its operations, having all largely increased, so that the net return to this complainant has become much less than it has heretofore been, and, it is not now, and never has been, as much as this complainant is entitled to receive. All of said maximum rates fixed by the proposed order of the State Corporation Commission are lower than a just compensation for the services rendered, and are lower than would afford this complainant a reasonable and just return upon the value of its property used in performing the services in return for such rates.

This complainant further shows that all its charges are just and reasonable in themselves, and do not and will not give to this complainant more than a just and reasonable return upon the value of its property used in the transportation service which it renders to the public; and that any reduction in its revenues will seriously embarrass and obstruct it in providing, and will deprive it of its power to properly provide the facilities which the public commerce dependent upon it for transportation absolutely requires for the movement of traffic.

This complainant further shows that there is no just reason for making a rule for some of the railroads different from that made for the complainant in respect to its passenger charges, and that there is no reasonable basis for such difference. Each of the carriers in said State of Virginia is, under the Constitution of the United States, entit-

led to charge a reasonable compensation for the services rendered, and the difference in rates ordered by the said Commission creates a merely arbitrary classification based upon no power or sufficient reason. This complainant is, therefore, advised that the effect of said order in making such difference in classification and in permitting one carrier to charge for the same service in Virginia a greater sum than is permitted to another carrier in Virginia is to deprive this complainant of the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, which this complainant, in this regard, here again respectfully sets up and claims."

THE CASE OF THE NORFOLK AND WESTERN RAILWAY COMPANY, APPELLEE, IN NO. 274.

The Bill of Complaint of this Appellee shows as follows (Record in 274, p. 12 to 17):

"The existing passenger rates and charges in effect upon this complainant's lines in the State of Virginia, and applicable to intrastate business in said State, are not higher than three cents a mile, and are not higher than is just and reasonable, whether considered in respect to the value of the property used by this complainant in the public intrastate service in Virginia, or in respect to the value of the service rendered to the travelers upon its lines. The said rates are less than the said complainant is permitted to charge by its said contract with the State of Virginia.

Complainant further respectfully represents that from time to time, in order to accommodate the public and induce travel upon its railway, it causes to be issued various tickets known as mileage books, summer excursion tickets, convention rates and other classes of tickets which are sold under particular conditions and at rates substantially lower than the regular tariff, and that such rates are not higher than are just and reasonable whether considered in respect to the value of the property used in the service rendered and the cost thereof, or in respect to the value of the service rendered to the passenger.

This complainant has already filed as an exhibit and as a part of this bill the answer filed by it before the State Corporation Commission of Virginia, in which it endeavored to show cause why a maximum rate of two cents per mile for the transportation of passengers over its line in Virginia should not be prescribed, and in said answer it set forth particularly the effect upon the business of this complainant at said rate had the same been in effect for the year ending June 30th, 1905, to which exhibit and statement therein reference is now made and the same is prayed to be read as part hereof.

By this answer it will appear that the effect upon the intrastate passenger revenues of this complainant in Virginia, if the said order had been in effect during that year ending June 30th, 1905, would have been to reduce the returns upon capital embarked in that business to the inadequate return of 9/10 of one per cent., a sum utterly insufficient even to discharge the proper portion of the interest upon the mortgage obligations of respondent and would yield no return whatever upon the stock of respondent; and accordingly this complainant in that answer set up and relied upon confiscation as here.

Complainant further avers that since the filing of said answer another operating year of this Company has expired and complainant avers that upon the application of the proposed order for a two cent maximum passenger rate to its business for the year ending June 30th, 1906, the same will appear to be as disastrous to the business and rights of this Company as was shown that such a rate would have been to its business and rights for the year ending June 30th, 1905. This condition is shown by the following statement made up by the accounting department of this Company and which is believed to be correct of the effect of said order would have been upon the business of this last year.

The gross earnings of this complainant from its intrastate passenger traffic in Virginia for the year ending June 30, 1906, were, $1,616,359.91

Deduct from this sum the ordinary operating expenses incident to this service, which expenses are not less than 63.9 per cent. of such gross earnings..... $1,032,876.53

Leaving earnings from operation.... $583,518.66

Complainant, however, avers that this sum cannot properly be treated as net earnings resulting from its intrastate passenger business in the State of Virginia, because complainant has, in addition to the operating expenses paid by it as incidental to its passenger service, to pay to the State of Virginia, its counties and municipalities, large sums of money for taxes and assessments, and also from year to year has to pay large sums of money for extraordinary cost of operation which it sometimes calls betterments, but which are not proper subjects of capitalization and the passenger service in Virginia of this respondent should bear its proper proportion of these two items of cost; and complainant believes and further avers that the proper proportion to be borne by its intrastate passenger service, is that proportion of its taxes and extraordinary operating expenses as the gross earnings of its intrastate passenger service bears to the entire gross earnings in the State of Virginia, resulting from both its interstate and intrastate passenger and freight earnings; and complainant therefore believes and avers that according to the Statements made up by its Accounting Department and which are believed to be correct the gross amount of its entire passenger earnings in the State of Virginia for the year ending June 30th, 1905, was the sum of $2,693,991.98, and that the gross amount of its entire freight earnings for the same year was the sum of $13,610,357.06, making a total earnings of both classes of its business, freight and passenger; and including its interstate and intrastate earnings of the sum of $16,304,349.04, and that the percentage of its gross earnings derived from its intrrastate passenger service for said year is 9.91 per cent. of the total earnings of complainant in the State of Virginia.

The amount of earnings hereinbefore set forth are, however, subject to further deductions covering the proper proportion of taxes and betterments as above stated according to such statements made up by the Accounting Department of this complainant, as follows:—

Maximum earnings from intrastate passenger business in Virginia, after deducting ordinary operating expenses		$583,518.66
From this sum should be deducted the proper proportion of taxes to be charged to this class of service, which proportion is 9.91 per cent. of the entire taxes paid to the State of Virginia and its counties	$50,737.29	
Deduct also the proper proportion of extraordinary expenses, which is 9.91 per cent. of the entire amount paid for such extraordinary improvements in Virginia	118,984.35	169,721.64
Leaving a balance of		$413,797.02

As a result of the foregoing analysis of the intrastate passenger business of this complainant in the State of Virginia for the year ending June 30, 1906, complainant believes and avers that the only net earnings that it received from that source which could be devoted by it for the purpose of paying interest on its bonded indebtedness and upon its outstanding stock obligations was about the sum of about $413,797.02.

Complainant further avers that the amount of capital of this Company embarked in its business in Virginia of all sorts as shown by allotting that proportion of its bonded indebtedness and capital stock applying to and supported by the property in Virginia according to the market value

of such securities as of the 30th day of June, 1906, is about $92,964,199.00. Distributing said capital on the basis of the proportion that the gross earnings from intrastate passenger service bears to the entire gross earnings of the State, here is ascertained that this complainant has invested for the purpose of earning said passenger receipts the sum of $9,212,752.00. The net earnings from said passenger service in Virginia amounted under then existing passenger tariffs to a return of only *four and forty-nine one hundredths per cent.* upon the capital invested.

Complainant further avers that, since the publishing of the proposed order reducing its passenger fares to two cents a mile, it has caused an investigation to be made as to the result that said order would have had upon its revenue derived from intrastate passenger service in the State of Virginia for the year ending June 30, 1906, and has ascertained therefrom and believes that had such proposed reduction been in effect during that year the gross earnings it would have received from its passenger service in the State of Virginia would have been reduced by about the sum of $339,788.28 and that the net earnings of this respondent from its intrastate passenger service in the State of Virginia, instead of being the sum of $413,797.02 would have been the sum of about $73,918.74 which sum would have represented a return upon the capital invested in the conduct of this class of respondent's business of *eighty-one one hundredths of one per cent.*, (81/100 of 1 per cent.) a sum utterly insufficient even to discharge the proper proportion of the interest upon the mortgage obligations of respondent and would yield no return whatsoever upon the stock of respondent.

The complainant further shows unto the court that even in the event the amount of its capital invested in its business in the State of Virginia is ascertained upon the basis upon which its property is assessed by said state for purpose of taxation including the capitalization of its franchise tax, which franchise tax under Sections 177 and 178 of the Constitution of Virginia, reading as follows:

"SEC. 177. Each such railway or canal corporation, including also any such as is exempt from taxation as to its works, visible property, or profits, shall also pay an annual State franchise tax equal to one per centum upon the gross receipts hereinafter specified in section one hundred and seventy-eight, for the privilege of exercising its franchises in this State, which, with the taxes provided for in section one hundred and seventy-six, shall be in lieu of all other taxes or license charges whatsoever upon the franchises of such corporation, the shares of stock issued by it, and upon its property assessed under section one hundred and seventy-six; provided, that nothing herein contained shall exempt such corporation from the annual fee required by section one hundred and fifty-seven of this Constitution, or from assessments for street and other public local improvements authorized by section one hundred and seventy; and provided, further, that nothing herein contained shall annul or interfere with, or prevent any contract or agreement by ordinance between street railway corporations and municipalities as to compensation for the use of the streets or alleys of such municipalities by such railway corporations."

"SEC. 178. The amount of such franchise tax shall be equal to one percentum of the gross transporation receipts of such corporation for the year ending June the thirtieth of each year, to be ascertained by the State Corporation Commission, in the following manner:

(*a.*) When the road or canal of the corporation lies wholly within this State, the tax shall be equal to one percentum of the entire gross transportation receipts of such corporation.

(*b.*) When the road or canal of the corporation lies partly within and partly without this State, or is operated as a part of a line or system extending beyond this State, the tax shall be equal to one percentum of the gross transportation receipts earned within this State, to be determined as follows: By ascertaining the average gross transportation receipts per mile over its whole extent within and without this State,

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> and multiplying the result by the number of miles operated within this State; provided, that from the sum so ascertained there may be a reasonable deduction because of any excess value of the terminal facilities or other similar advantages in other States over similar facilities or advantages in this State."

is made to be one percentum upon the gross transportation receipts of this Company, that the imposition of a two cent maximum passenger rate would as this complainant believes and charges, result in such a reduction of its revenues as to amount to the confiscation of its property. This will abundantly appear by the consideration of the following figures made up by the accounting department of this Company and which are believed to be correct.

The physical property of complainant in Virginia was for the year 1906 assessed for taxation at the sum of $24,202,734.00. The franchise tax paid by this Company for the same year was the sum of $161,742.22. Had, however, the proposed two cent maximum passenger rate been in effect the revenue of this Company from its Virginia business would have been at least reduced to such an extent whereby the franchise tax for said year would have been $157,684.70. The capitalization of this franchise tax of $157,684.70 on the basis of the tax rate in Virginia for State Taxation, to wit: thirty-five cents upon one hundred dollars would represent a capital of $45,052,771.00, to which sum should be added the assessed value of the physical properties in Virginia of $24,202,734.00 and the aggregate of these two capital sums would show the sum of $69,255,505.00 as being the capital of this Company invested in its business in the State of Virginia ascertaining said capital on the basis of taxes paid by this Company during that year.

The complainant, however, further shows that there is in respect to this complainant's property, as in respect to all other classes of property in the State of Virginia, whether owned by individuals or corporations, a difference

between the commercial and tax assessment value, the commercial value being in respect to all classes of property greater than the value assessed for purposes of taxation, and while this complainant does not admit but on the contrary expressly denies that the assessed value is as great as the value which should be considered for the purpose of determining its right to make reasonable earnings out of and reasonable returns on the property used by it in doing its intrastate passenger business as a common carrier in Virginia and performing the public service required of it as such complainant is advised that the State of Virginia having made the assessment for the proposed taxation upon the complainant's property in said state cannot deny that its property in that state is worth at least the amount of said assessment, and in fact its property in Virginia is worth more than the amount of said assessment, and it would cost more to reproduce. If, however, the earnings which it can make under the proposed passenger rates and charges are estimated only in reference to said assessed value of the said property made in the State of Virginia for the purpose of taxation, the complainant avers that the proposed rates and charges will not permit it to earn reasonable profits and enjoy reasonable returns even upon that valuation, and such rates and charges will deprive it of the legitimate use of its property.

The assessment upon the physical properties of the complainant in the State of Virginia for the year ending June 30th, 1906, was, $24,202,734.00.

The franchise tax based upon the freight earnings of this Company in Virginia and its passenger earnings had a maximum two cent passenger rate been in effect capitalized on the basis of thirty-five cents on one hundred dollars would show a valuation for said year of $45,052,771 making a total assessed value of $69,255,505.00. Taking the proportion of this valuation which is used for the purpose of producing revenues from intrastate passenger traffic in Virginia in the ratio in which the gross intrastate passenger earnings in Virginia bear to the total gross traf-

fic revenues in Virginia, namely 9.91 per cent., the value of the property of this complainant used in Virginia for intrastate passenger purposes on the basis of Virginia assessment for purpose of taxation is shown to be $6,863,220.00. Upon this valuation the present net revenue of $413,797.02 from its intrastate passenger business yields a return of about 6.03 per cent. upon the capital devoted to this purpose. Whereas had the proposed maximum two cent passenger rate been in effect the amount of earnings from this class of business would have been reduced by the sum of $339,878.28, and the net earnings of the Company would only have been the sum of $73,918.74, which would have represented a return of *one and eight one-hundredths* per cent. (1 & 8/100 of 1 per cent.) upon its capital.

Complainant avers that in ascertaining the operating expenses incident to the earning of its intrastate passenger earnings for the year ending June 30, 1906, it has assumed that it requires the expenditure of 63.9 cents to earn one dollar of such revenue, which is the percentage it ascertained as the cost of that service for the year ending June 30, 1905, and although the passenger earnings for the year ending June 30, 1906, have been greater and it may be that the excess cost may not be fully equal to such excess earnings, yet the difference in the final result will not, as complainant believes and charges, be sufficient to materially affect the final result in respect to the inadequate return upon the capital invested.

Complainant believes and further avers that the conditions existing during the year 1906 represent in a fair degree the conditions that have heretofore existed and will continue to exist in regard to the operation of this Company, except in respect to the cost of doing its business, which cost is increasing greatly from year to year, and although the figures of the current fiscal year are unavailable to be furnished owing to the fact that the fiscal year will not expire until the 30th of June next, yet complainant has sufficient information to inform the court that although its gross earnings have increased a considerable

sum over the gross earnings for the corresponding period of the previous year, yet the cost and expenses incident to the conduct of the work of complainant have advanced so rapidly that the net earnings of this Company have been steadily decreasing during the entire current year and from the period from July 1, 1906, to March 31, 1907, this decrease of net earnings upon its entire business has amounted to about $501,920.

The general commercial conditions in Virginia are prosperous; the transportation service rendered by the complainant in intrastate transportation is large, and, at reasonable rates, the returns therefor to this complainant would be as this complainant is informed and believes much greater.

Your complainant says that no one can predict with any certainty that the gross receipts of your complainant, even at the present rates of fare, will be greater in the future than they have been in the past, or that they will even equal the receipts of the past few years; and that there is no certain basis upon which to found an opinion that the lower rates of fare provided for in said order of the State Corporation Commission would increase travel upon your complainant's lines and to so prophesy is to indulge in pure speculation without any substantial basis of experience upon which to make an estimate.

The lines of railway of this complainant have at all times been operated as economically as practicable, under the existing conditions, and its operating expenses have at all times, under the conditions confronting it, been as reasonably low in amount as they could be made by economical and judicious management, and it has not been possible, under the conditions existing, for the complainant to operate its road for less than it has been operated. In all respects it has confined its operating expenses, its taxes, its interest, and every other expenditure within the lowest and narrowest limit reasonably practicable under existing conditions.

The complainant respectfully shows to this Honorable Court that the result of the enforcement of the said order

would be to deprive this complainant of its property without just compensation, to deprive it of the equal protection of the laws, and to take its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and is also in violation of the Commerce Clause of the Constitution of the United States, the benefit and protection of all of which clauses in the Constitution of the United States it expressly sets up and claims.

The complainant further believes and avers that its present rates in Virginia are not higher than a reasonable compensation for the service rendered by it to travelers on its lines, and are in no sense excessive or extortionate; that they are not unjustly, unduly, unreasonably or illegally discriminatory as between individuals, nor as between localities, and that they in no way violate any law. The complainant is advised that it has, as an incident of its property, and as a property right, the right to charge for each service which it renders a reasonable compensation, and that this complainant is protected by the Fourteenth Amendment to the Constitution of the United States in making, receiving and collecting such charge. The effect of the enforcement of the said order would be materially to diminish this complainant's charges, and to reduce them greatly below what would be a reasonable compensation for the respective services rendered to the travelers on its lines."

The Case of Southern Railway Company, Appellee in No. 275.

The Bill of Complaint of this appellee shows as follows (Record in 275, p. 11 to 17):

"The existing passenger rates and charges in effect upon this complainant's lines in the State of Virginia, and applicable to intrastate business in said State, are not higher than three cents a mile, and are not higher than is just and reasonable, whether considered in respect to the value of the property used by this complainant in the pub-

lic intrastate service in Virginia, or in respect to the value of the service rendered to the travelers upon its lines. The said rates are less than the said complainant is permitted to charge by its said contract with the State of Virginia.

The complainant shows that the effect of the rates set forth in the said order of the Commission and now proposed to be put into effect by it upon the business of this Complainant, between points both of which are in the State of Virginia, and which does not pass out of said State en route, for the year ended June 30, 1905, is as follows, except for the slight difference hereinafter indicated:

The maximum actual net earnings from Virginia intrastate business for said year, after deducting the proper proportion of improvements and betterments not capitalized, and the proper proportion of taxes, were	$182,817.64
Whereas, under a flat rate of two cents per mile in Virginia such maximum net intrastate earnings on the business of the same year would be	1,639.46
Showing a reduction of such actual net earnings from Virginia intrastate business for said year under a rate of two cents per mile of	181,178.18
The foregoing maximum net earnings are arrived at as follows:	
The maximum earnings from intrastate traffic in Virginia, after paying the cost of operation for said year amounted to	278,915.29
The ratio of the intrastate gross traffic revenue in Virginia for said year to the entire gross traffic revenue of the Virginia lines of this complainant, covering both inter and intrastate traffic in Virginia for said year, is 26.94%.	

26.94% of the gross taxes ($213,339.72) paid in Virginia by complainant in said year is	$57,473.72	
26.94% of the improvements and betterments, not capitalized, chargeable to complainant's Virginia properties during said year ($143,370.20) is	38,623.93	
Total taxes and improvements and betterments so chargeable against intrastate traffic		$96,097.65
Leaving maximum net intrastate earnings as above mentioned, after deducting the said proportion of taxes, improvements and betterments		$182,817.64

The above figures are given on the basis of a flat passenger rate of two cents per mile on all the lines of this complainant in the State of Virginia, which was the basis suggested by the State Corporation Commission of Virginia in its notice, and no notice has been given to this complainant as required by the Constitution of Virginia, by publication or otherwise, of any inquiry into any different rate than said two cents per mile, and, inasmuch as no such notice has been given of the rate which the Commission has sought to put into effect by its said order upon the lines of this Commission, then the said order is totally void as against this complainant; but, while the exact effect of the two and one half cent rate permitted by the said Commission's order on a few of the minor lines of this complainant in the State of Virginia, to-wit; on the Atlantic & Danville line, about two hundred and four miles in length, where the travel is light; on the Claremont Branch, which is a narrow gauge branch, fifty miles in length, and where the travel is not only light but insignificant; and on the Franklin Branch, about thirty-seven miles in length, where the travel is likewise not only light

but insignificant, can not be stated with entire accuracy at this time, this complainant is advised and here shows to the court that the effect of putting into use a two and one half cent rate upon the lines mentioned instead of a two cent rate would only be to increase the intrastate earnings of this complainant over and above the figures above given by about the sum of $6,193.71.

The complainant further shows that there is, in respect to this complainant's property, as in respect to all other classes of property in the State of Virginia, whether owned by individuals or corporaions, a difference between the commercial and tax assessment value, the commercial value being, in respect to all classes of property, greater than the value assessed for purposes of taxation, and while this complainant does not admit; but, on the contrary, expressly denies, that the tax assessment value is as great as the value which should be considered for the purpose of determining its right to make reasonable earnings out of, and reasonable returns on, the property used by it in doing its intrastate business as a common carrier in Virginia, and performing the public service required of it as such, the complainant is advised that the State of Virginia, having made the assessment for the purposes of taxation upon the complainant's property in said State, can not deny that its property in that State is worth at least the amount of said assessment, and, in fact, its property in Virginia is worth more than the amount of said assessment and it would cost more to reproduce it. If, however, the earnings which it can make under the proposed passenger rates and charges are estimated only in reference to the said assessed value of its said property made by the State of Virginia for the purposes of taxation, the complainant avers that the proposed rates and charges will not permit it to earn reasonable profits and enjoy reasonable returns, even upon that valuation, and such rates and charges will deprive it of the legitimate use of its property.

The *ad valorem* assessment upon the physical properties of the complainant in the State of Virginia for the year ending June 30, 1905, was.....	$12,807,857.00
The franchise tax capitalized at the same rate of taxation as that imposed upon its physical properties, to-wit, thirty-five cents on a hundred dollars, would show a value for said year of.....	$17,069,838.57
Thus making a total assessed value of.....	$29,877,685.57
Taking the proportion of this valuation which is used for the purpose of producing revenue from intrastate traffic in Virginia in the ratio which the gross intrastate traffic earnings in Virginia bear to the total gross traffic revenue in the State of Virginia, which is the proper method of apportionment, namely, 26.94 per cent., the value of the property of this complainant used in Virginia for intrastate purposes, on the basis of Virginia's assessment for purposes of taxation, is shown to be.....	$8,049,048.49

Upon even this valuation the net earnings permitted to this complainant under the proposed passenger rates and charges from its intrastate business in the State of Virginia for said year would only amount to ten one hundredths of one per cent. on such portion of the said taxed value, before allowing anything for payment of interest on its bonds or dividends on its stock.

Whereas, if only the assessed value of the physical properties of this complainant in the State of Virginia be considered and the same proportion thereof be taken as the value of the property used in producing the intrastate revenue in said State, then the earnings of this complainant under the proposed rates and charges would be twenty three one hundredths of one per cent. on such valuation, before allowing anything for the payment of interest on its bonds or dividends on its stock.

Neither of such returns is a reasonable profit upon the invested capital or upon the actual value of the property used.

The complainant further shows that the total bonded indebtedness of this complainant applicable to its Virginia property on the basis of setting out to Virginia all of such indebtedness that is specially a lien upon the Virginia properties, and a lien on no other properties, and taking the Virginia mileage proportion of the general bonded indebtedness of the complainant is.....	$38,509,438.36
On which the annual interest charge which complainant is obliged to pay was, for said year.....	1,718,530.52
And that the annual trackage rentals paid for lines in Virginia by this complainant for said year amounted to.....	$209,515.17
The net income from intrastate traffic in Virginia should contribute its *pro rata* proportion to the payment of such interest and rental charges, namely, at least 26.94 per cent., or the sum of....	$519,415.51
But the total net earnings from intrastate traffic in the State of Virginia under the proposed rates and charges would not exceed.....	$7,833.17
Which would leave a deficiency after paying the amount properly apportionable to intrastate traffic in the State of Virginia of such interest and rentals of.....	511,582.34

And no return whatever to the owners of said property.

The reduction applicable to the net intrastate revenue of complainant in the State of Virginia, caused by the rates now proposed by said Commission for the year ending June 30, 1906, would be approximately.....	$190,000.00

The complainant further shows that the figures given in this bill, in respect to the result on its revenues for the year ended June 30, 1905, are in their net result fairly representative of past and future conditions, except that the operating expenses of the complainant have, since June 30, 1905, increased relatively far more than its gross earnings, and that the net result will be even more unfavorable, and yield a still smaller relative return to the complainant than is here shown for the year ended June 30, 1905.

Figures given in this bill are, as will be noted, for the year ended June 30, 1905. The reason similar figures are not given for the year ended June 30, 1906, is that they have not as yet been accurately compiled, but the complainant asks leave in the progress of this cause to give similar figures for the year ended June 30, 1906, which complainant alleges will show practically the same confiscatory consequences of the said proposed passenger fares as are here shown for the year ended June 30, 1905.

The general commercial conditions in Virginia are prosperous; the transportation service rendered by the complainant in intrastate transportation is large, and, at reasonable rates, the returns therefor to this complainant would be much greater.

The complainant further shows that there will be no compensatory increase in the business of this complainant resulting from the proposed reduced rates, and that there will be no appreciable or substantial increase whatever in such business due to such reduced rates.

The lines of railway of this complainant have at all times been operated as economically as practicable, under the existing conditions, and its operating expenses have at all times, under the conditions confronting it, been as reasonably low in amount as they could be made by economical and judicious management, and it has not been possible, under the conditions existing, for the complainant to operate its road for less than it has been operated. In all respects it has confined its operating expenses, its taxes, its interest, and every other expenditure within

the lowest and narrowest limit reasonably practicable under existing conditions.

* * * * * * *

The complainant further shows that its present rates in Virginia are not higher than a reasonable compensation for the service rendered by it to travelers on its lines, and are in no sense excessive or extortionate; that they are not unjustly, unduly, unreasonably or illegally discriminatory as between individuals, nor as between localities, and that they in no way violate any law. The complainant is advised that it has, as an incident of its property, and as a property right, the right to charge for each service, which it renders a reasonable compensation, and that this complainant is protected by the Fourteenth Amendment to the Constitution of the United States in making, receiving and collecting such charge. The effect of the proposed rates and charges would be to materially diminish this complainant's charges, and to reduce them greatly below what would be a reasonable compensation for the respective services rendered to the travelers on its lines.

* * * * * * *

This complainant further shows that many of its existing rates are lower than is just compensation for the service rendered, and have heretofore yielded, and will continue to yield to the complainant, much less than a reasonable return upon the value of its property employed in such service. Since they were fixed, the operating expenses of the complainant have, without its fault, been largely increased, the cost of equipment, of materials and supplies, and of labor, necessary for its operations, having all largely increased, so that the net return to this complainant has become much less than it has heretofore been, and it is not now, and never has been, as much as this complainant is entitled to receive. All of said maximum rates fixed by the proposed order of the State Corporation Commission are lower than a just compensation for the service rendered, and are lower than would afford this complainant a reasonable and just return upon the value of its property used in performing the services in return for

such rates, and that the effect of said order, because thereof, and also because said order undertakes to impose an immovable maximum, is to deprive this complainant of its property without due process of law, and of the equal protection of the laws, and to take its property without just compensation, contrary to the said Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which is again, in this regard, expressly set up and claimed."

(To be read in connection with page 62 at end of Point V in "Brief of Argument of Appellees," and also in connection with page 46 of "Supplemental Brief of Appellees on the Question of Jurisdiction.")

But we are fortunate in having a decision of the Supreme Court of Appeals of Virginia bearing upon this very question, and on which we rely, viz.:

Atlantic Coast Line Ry. Co. *et als. v.* Comth. of Va. (March 24, 1904), 102 Virginia, 599. This was a case involving storage, demurrage and car service charges promulgated by the State Corporation Commission of Virginia under authority of the Constitution of Virginia, Section 156. The exercise of the power to establish storage, demurrage and car service charges is given in the same language by the same section of the Constitution with the power to promulgate and establish rates. The power of the Commission to establish storage, demurrage and car-service charges is identical with the power to establish rates. The Constitution, Section 156, sub-section (*b*), provides that the Commission shall have the power and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in Virginia, and in all matters relating to the performance of their public duties, and their charges therefor, and of correcting abuses therein by such companies; and to that end the Commission shall, from time to time, prescribe, and enforce against such companies, in the manner thereinafter authorized, such rates, charges, classification of traffic and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the Commission may, from time to time, alter or amend. It being further provided, that before the Commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any rate, order, rule, regulation or requirement directed against any one or more companies, it shall give notice and have a hearing; the authority of the Commission (subject to review on appeal, as provided) to prescribe rates, charges and classifications of traffic shall be paramount, but its authority to prescribe any other rules, regulations or requirements shall be subject to the superior authority of the General Assembly to legislate thereon by general laws.

By sub-section (*d*) it is provided that from any action of the Commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon, or an increase thereof, an appeal may be taken to the Court of Appeals.

There was duly given the notice and hearing provided for; the Commission sat with all the form, as counsel for the appellants have set out so fully, spent days in the examination of witnesses, arguments of counsel, etc. The Federal question under the commerce clause was duly raised on the record, as will be seen (102 Virginia, 613), and the objection properly made that each and all of the charges, rules and regulations were in violation of the commerce clause of the Constitution of the United States, and that certain of them deprived the railway companies of the use of their property without due process of law and was in violation of the Fourteenth Amendment. Not knowing what would be the effect of the order of the Commission, an appeal was taken to the Court of Appeals of Virginia, and Judge Buchanan, in delivering the opinion of the court, said (pp. 618-619):

> "To hold that they are invalid, so far as they apply to interstate and foreign commerce, as the appellants insist should be done, might have the effect of depriving the State of her undoubted right, under her reserved powers, to make provisions for the purpose of enforcing the obligations of transportation companies to accommodate the public, and for regulating the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public convenience and the public good, when such regulations are in aid of, or only incidentally affect, interstate commerce, and do not violate any right protected by the Constitution of the United States.
>
> "To hold, on the other hand, that the rules would not, in their operation, directly intrench upon the authority

of the United States, nor violate any right protected by the Federal Constitution, might result in our denying transportation companies and others their just rights under the Constitution and laws of the United States, *and drive them to the Federal courts for the assertion and maintenance of rights* which ought to be guarded and enforced by the courts of the State, whose government they support, and from which they are entitled to protection." (Italics ours.) "For these and other reasons, which might be given, we are of opinion that we ought not, upon this appeal, to attempt to decide to what extent, if at all, the said rules and regulations, in their operation, may directly infringe upon the commerce clause of the Constitution of the United States, or violate any right of the appellants under that instrument, and that the decision of those questions can only be properly made as they arise in concrete cases, and upon the particular facts of each case.

" It is insisted by the appellants' counsel that if no relief is given them upon this appeal, as to the validity of the rules in question, their validity is, by the express terms of the Constitution, made conclusive, and cannot be questioned in an action or suit based upon the rules, and that no other provision is made by the Constitution by which their validity can be questioned, except in *quasi*-criminal proceedings, which the commission is authorized to institute against them for alleged violation of the said rules and regulations" * * * (page 621). "We are further of opinion that the question of their validity, so far as affected by the Constitution of the United States, may be raised and determined *in any case in which that question could be raised and determined, if the rules and regulations in question had been enacted as statutes by the General Assembly*, except as prohibited by sub-section "d" of Section 156 of the Constitution, (which subsection is not in point here, and has no relation to this matter). (Italics ours.)

In further confirmation of this, see

Southern Ry. Co. *v.* Commonwealth, 107 Va., 771. In this case there was drawn in question the validity of Rule 1 prescribed by the State Corporation Commission, which requires transportation companies unconditionally to furnish empty cars to shippers within four days after application therefor, and imposes a penalty for its violation.

The Court of Appeals of Virginia held that this Rule 1 imposes an unreasonable burden on interstate commerce, and was in conflict with the Act of Congress regulating interstate commerce. Cardwell, Judge (with whom Keith, P., concurs), said (p. 772):

> "The rules established by the State Corporation Commission for the regulation of transportation companies and shippers doing business in this State came under review in Atlantic Coast Line Railway Co. *v.* Commonwealth, 102 Va., 599, 46 S. E. 911, and it was held that, while said rules and regulations, as applied to transportation companies and shippers doing business in this State, are reasonable, just and valid, whether said rules and regulations do, in their operation, directly infringe upon the commerce clause of the Constitution of the United States, or violate some right of such companies or shippers protected by that instrument, can be properly determined only as the questions arise in concrete cases, and upon the particular facts of each case." * * *

(P. 775):

> "That shipments of freight from this State into other States is interstate commerce requires no argument or citation of authority." * * *

(P. 777):

> "Under the requirements of the rule, the equipment of the carrier from other States might have to be withdrawn to an extent necessarily and directly obstructing the movement of interstate commerce originating in such other States. * * *

"The constitutional validity of a law is to be tested, not by what has been done under it but by what may be done. Stuart *v.* Palmer, 74 N. Y., 191; 30 Am. Rep., 289; Violette *v.* Alexandria, 92 Va., 561; 23 S. E., 909; 53 Am. St. Rep., 825; 31 L. R. A., 382." * * *

(P. 785):

"We are of opinion, for the reasons stated, that Rule 1 of the series of car-service and demurrage rules, established by the State Corporation Commission for the government of transportation companies and shippers doing business in this State, here in question, as applied to this case, is invalid and void, because in conflict with the commerce clause of the Constitution of the United States. Therefore, the judgment of the Commission appealed from will be reversed and annulled, and this proceeding dismissed."

Whittle, Judge, concurred in the opinion of Judge Cardwell that Rule 1, in question, was not a reasonable exercise of the police power of the State with respect to furnishing cars for interstate shipments, but was of opinion that it was within the competency of the State Corporation Commission, in the absence of legislation by Congress, to establish reasonable rules and regulations, whether the freight be intended for intra or interstate shipment.

While Buchanan and Harrison, Judges, were of the opinion that the State, under its police or reserve powers, had the right to make reasonable regulations as to the furnishing of cars, not only for intrastate, but also interstate shipments, and for that reason did not concur in the reasoning of the other Judges, yet they did concur in the conclusion that Rule 1 of the State Corporation Commmission was invalid as being an improper regulation of interstate commerce.

Thus it will be seen that the entire Court of Appeals of Virginia entered a unanimous judgment and order that Rule 1, which had been under consideration along with the other rules in A. C. L. Ry. Co. *v.* Commonwealth, 102 Va., 599, was

invalid under the commerce clause of the Constitution of the United States.

If they had considered the action of the State Corporation Commission a final judgment and ascertainment on notice and hearing of the validity of Rule 1, along with the validity of the demurrage and car service rules from which the appeal was taken in the A. C. L. case, 102 Va., 599, so that the question was *res adjudicata* as the judgment of a court of competent jurisdiction acting judicially upon the subject matter, they would have stultified themselves in holding in the case of Southern Ry. Co. *v.* Commonwealth, 107 Va., 771, the rule to be invalid.

This, it is submitted, completely disposes of the contention of counsel for appellants that the action of the State Corporation Commission complained of in these proceedings is *res adjudicata*, because the result of the Commission's act in this case prescribing a two-cent rate was in its nature and character the same as the result of the Commission's action in the demurrage case (102 Va.), which the Supreme Court of Appeals of Virginia declared to be a legislative result subject to inquiry by any court of competent jurisdiction in any concrete case.

It will be noted that this case is the last pronouncement of the Court of Appeals of Virginia upon this subject, and subsequent to any case cited by counsel for appellants in their briefs.

It is perfectly clear, therefore, that the Supreme Court of Appeals of Virginia has recognized the right of railway companies to appeal to the jurisdiction of the Federal courts for the protection of their rights under the Constitution and laws of the United States, being of the opinion that the action of the State Corporation Commission of Virginia in establishing rates, charges, classifications, rules, and requirements of traffic may be raised and determined in any case, and in any court in which the question could be raised and determined, if the action in question has been enacted as a statute by the General Assembly, and therefore that the action of the State Corporation Commission was not *res adjudicata*.

Office Supreme Court, U. S.
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OCT 10 1908
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

ROBERT R. PRENTIS ET AL., *Appellants*, v. ATLANTIC COAST LINE RAILROAD COMPANY. } No. 270.

ROBERT R. PRENTIS ET AL., *Appellants*, v. CHESAPEAKE & OHIO RAILWAY COMPANY. } No. 271.

ROBERT R. PRENTIS ET AL., *Appellants*, v. CHESAPEAKE WESTERN RAILWAY. } No. 272.

ROBERT R. PRENTIS ET AL., *Appellants*, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY. } No. 273.

ROBERT R. PRENTIS ET AL., *Appellants*, v. NORFOLK & WESTERN RAILWAY COMPANY. } No. 274.

ROBERT R. PRENTIS ET AL., *Appellants*, v. SOUTHERN RAILWAY COMPANY. } No. 275.

SUPPLEMENTAL BRIEF FOR APPELLEES ON THE QUESTION OF JURISDICTION.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

Robert R. Prentis et al., *Appellants*, v. Atlantic Coast Line Railroad Company.	No. 270.
Robert R. Prentis et al., *Appellants*, v. Chesapeake and Ohio Railway Company.	No. 271.
Robert R. Prentis et al., *Appellants*, v. Chesapeake Western Railway.	No. 272.
Robert R. Prentis et al., *Appellants*, v. Louisville and Nashville Railroad Company.	No. 273.
Robert R. Prentis et al., *Appellants*, v. Norfolk and Western Railway Company.	No. 274.
Robert R. Prentis et al., *Appellants*, v. Southern Railway Company.	No. 275.

Supplemental Brief for Appellees on the Question of Jurisdiction.

ARGUMENT.

No question arises in any of these cases except as to the jurisdiction of the Circuit Court to make the final order restraining the publication or enforcement of the disputed

rates, which is to be found at page 208 of the Record in the Southern Railway case.

No question was made in the Circuit Court and none is made here as to the truth of the allegations of the several bills of complaint, the entire objection being to the jurisdiction of the Court.

THE BILLS OF COMPLAINT FILED IN CIRCUIT COURT SHOW AMPLE GROUNDS FOR FEDERAL JURISDICTION.

The bills, the allegations of which were admitted by the defendants, and which were taken for confessed, allege the jurisdictional amount, set out in detail the necessary facts to show the confiscatory and destructive effect of the rates in question, that the rates complained of substantially and necessarily affect the rates on interstate commerce, and the bills of the Chesapeake & Ohio, Norfolk & Western, and Southern Railway companies, respectively, also allege the necessary facts to show that there existed a valid contract between the State of Virginia and the complainants therein, by which the State bound itself not to change the pre-existing rates without the assent of the respective companies referred to, and that the rates complained of constituted a violation of this contract.

The allegations referred to being admitted, there is no question that these allegations show Federal jurisdiction in respect to the following matters:

1. The enforcement of rates alleged and admitted to be confiscatory and contrary to the Fourteenth Amendment to the Constitution of the United States;

2. The enforcement of rates alleged and admitted to substantially affect and control interstate rates, contrary to the commerce clause of the Constitution of the United States;

3. As to the Chesapeake & Ohio, Norfolk & Western and Southern, the enforcement of rates alleged to be in violation

of Virginia's contract not to change the rates of these respective companies without their assent, contrary to the contract clause of the Constitution of the United States.

The facts on which these propositions are based being uncontested, it remains only to consider the question of the jurisdiction of the Circuit Court of the United States to make any order enjoining the members of the State Corporation Commission of Virginia.

This is the real question, and the only question, about which the Appellants make any controversy.

They place their whole reliance upon their contention that the State Corporation Commission of Virginia, and they as members thereof, no matter what they do, are beyond the reach of the Federal courts, exercising the original jurisdiction of injunction.

It is only necessary, therefore, as stated, to discuss the question of the jurisdiction of the Circuit Court to make the final order of injunction (to be found on page 208 of the said record).

That order finds that the rates in question violate rights of the complainants protected by the Constitution of the United States, and perpetually enjoins the defendants from the publication of, and the enforcement of, rates which thus violate the rights of the complainants guaranteed to them by the Constitution of the United States.

The State Corporation Commission of Virginia, the members of which in these cases assert that they can violate the rights of the Appellees guaranteed by the Constitution of the United States without becoming liable to the preventive jurisdiction of the United States Circuit Courts, was created by the Constitution of Virginia which was adopted in 1902.

That Constitution, by Section 156 (*a*), makes the State Corporation Commission

> "the department of government * * * through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance

thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State."

By sub-section (*b*) of section 156, it is provided that:

"The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company.

Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the City of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws: provided, however, that nothing in this section shall impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of

any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the commission, as far as possible, to effect by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons."

By sub-section (*c*) of the same section of the Constitution it is provided:

"In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates

and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the commission, within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed, or authorized by law; and each day's continuance of such failure or refusal after due service upon such corporation of the order or requirement of the commission, shall be a separate offense; provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties."

By sub-section (*d*) of the same section it is provided that an appeal as of right shall lie to the Supreme Court of Appeals of the State from any action of the Commission prescribing rates, charges, or classifications of traffic and in certain other matters. And that section further provides:

> "No court of this commonwealth (except the Supreme Court of Appeals, by way of appeal as herein authorized) shall have jurisdiction to review, reverse, correct or annul any action of the Commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; * * *."

Sub-section (*e*) of the same section permits, but does not require, the appellate court to grant a writ of supersedeas on such appeal.

It further provides that, upon the execution of a suspending bond, the Commission

"shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any supersedeas), of the order or requirement appealed from, to keep such accounts, and to make to the commission, from time to time, such reports, verified by oath, as may, in the judgment of the commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the commission appealed from, together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company pending the appeal, be not sustained on such appeal; and the commission shall also, from time to time, require such company, under like penalty, to give additional security on, or to increase, the said suspending bond, whenever, in the opinion of the commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid."

By sub-section (*g*) of the same section it is provided:

"Whenever the court upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such order as, in its opinion, the commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the commission at the time the original order appealed from was entered. * * * "

By sub-section (*h*) of the same section it is provided:

"(*h*) The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit, or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the commission may impose, or be

> authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the commission; but, in no such proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the commission, within the scope of its authority, and then in force, be questioned: provided, however, that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof."

Sections 155 and 156 of the Constitution of Virginia from which the above extracts are made are set out in full in the appendix to this brief.

The question presented in these cases is whether the Commission, thus created and possessing the powers above set out is, when attempting to invade property rights of the Appellees protected by the Constitution of the United States, subject to be enjoined in the appropriate Federal Circuit Court.

This question naturally presents itself in two aspects, and in the argument we shall attempt to show:

1. That, even on the argumentative concession that the Commission is a constitutional body notwithstanding the fourteenth amendment to the Constitution of the United States, its members are, when attempting to invade the property rights of the Appellees protected by the Constitution of the United States, subject to be enjoined by the appropriate Circuit Court of the United States; and

2. That the Commission of Virginia, because the Constitution of the State undertakes to confer upon, and unite in, it, the whole power of the State, legislative, executive, and

judicial, in respect to the rates in controversy, is, by the law of its creation, made a partial tribunal, and hence its judgments can not satisfy the requirements of due process of law. The law creating this union of powers, not being separable in its several provisions conferring these unconstitutional and inconsistent functions, is itself unconstitutional and void under the fourteenth amendment, in so far as it confers the powers referred to.

These will be discussed in their order:

FIRST.

Even on the concession, for the sake of the argument, that the Commission of Virginia is a constitutional body notwithstanding the fourteenth amendment to the Constitution of the United States, still its members are, when attempting to invade property rights of the appellees protected by the Constitution of the United States, subject to be enjoined by the appropriate Circuit Court of the United States.

I.

COMMISSION INVESTED WITH THE FULL POWER OF THE STATE OVER TRANSPORTATION COMPANIES IN THEIR PUBLIC RELATIONS, THEIR PROPERTIES AND THEIR EARNINGS. IT IS THE DEPARTMENT THROUGH WHICH THE "WHOLE BODY" OF THE STATE'S LAWS IN RESPECT TO THEM IS TO BE ADMINISTERED.

The Supreme Court of Appeals of Virginia has construed the Constitution as conferring upon the Commission executive, legislative and judicial functions.

> Norfolk & Portsmouth Belt Line R. R. Co. *v.* Commonwealth, 103 Va., 294.

From the extracts from the Virginia Constitution above quoted it will be seen that by Section 156 (*a*), the commis-

sion is expressly made the department of the State government through which shall be carried out "all the provisions of this" [the State] "Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in this State," which in general terms embraces all the powers of detection, prosecution, legislation and executive and judicial control, while sub-section (*b*), in conferring upon the Commission the power and charging it with the duty "of supervising, regulating and controlling all transportation * * * companies in all matters relating to the performance of their public duties and their charges therefor," of requiring them "to establish and maintain all such public service, facilities and conveniences as may be reasonable and just," of keeping itself informed "of the physical condition" of the railroads as to the manner of their operation, and of preventing discriminations of any kind, whether in rates or otherwise, goes more into detail and confers upon the commission all the powers of the State in respect to "visitorial" or executive matters involving the detection of any alleged wrong-doing, in respect to legislative "regulation," in respect to judicial matters involving judgment and determination of their rights, and in respect to their prosecution and punishment,—in other words, all executive, legislative and judicial powers deemed necessary for the visitation, supervision, regulation and control of these companies "in all matters relating to the performance of their public duties and their charges therefor."

And sub-section (*c*) undertakes, in explicit terms, to confer upon the Commission "the powers and authority of a court of record" to enforce compliance with its orders made in respect to any of the matters coming within its jurisdiction.

As the power of visitation and supervision is a power to detect, it has the power and the duty of detection; as the power of regulation involves the power to make rates and rules of future conduct, it has the power of legislation over the whole field of transportation companies' activities; as

"the powers and authority of a court of record" to pass upon the validity, justness and reasonableness of its own rates and rules is a judicial power, it has judicial power covering the same subjects in respect to which it has the power of visitation, supervision, regulation and control, and as it has power to institute proceedings in respect to all these matters before itself, it has the powers of prosecution.

It is thus invested with the whole power of the State over transportation companies as such, their properties and their earnings, and is the department in which is reposed the whole body of the State's power, visitorial, executive, legislative and judicial and also the power of prosecution, in respect to them.

As the whole power of the State is thus conferred, and the whole duty is thus expressly imposed, upon this Commission to enforce the rates which are established, it cannot be claimed, as was done in the case of Fitts *v.* McGhee, 172 U. S. 516, or in the case of Hunter *v.* Wood, 209 U. S. 472, that the defendants had no relationship, or too little, to the acts complained of and were therefore not subject to be enjoined in respect to them.

It is thus evident that the Commission possesses, and may enforce, under this system established by the Virginia Constitution, every power incident to the taking of property, from the initial to the final step. In other words,

II.

THE COMMISSION POSSESSES, UNDER THE VIRGINIA CONSTITUTION, THE WHOLE POWER OF CONFISCATION FROM THE INITIAL TO THE FINAL STEP.

It can do the whole work, legislative, executive and judicial, and entirely complete the act of confiscation. It is certain that somewhere along this line of confiscation must be found *the character of act* which has been uniformly enjoined when attempted by any of the other commissions established by the various states. The enforcement of con-

fiscatory rates is an act uniformly enjoined by the Federal courts when attempted by the commissions of states other than Virginia. Under the Virginia system the power to enforce rates is reposed in the Commission.

III.

THE STATE OF VIRGINIA COULD NOT, EVEN IF IT TRIED, ACCOMPLISH AN INVASION OF PROPERTY RIGHTS FORBIDDEN BY THE CONSTITUTION OF THE UNITED STATES BY THE DEVICE OF CONFERRING THE POWER OF CONFISCATION ON A TRIBUNAL WHICH IT CALLS A COURT. WHETHER OR NOT A FEDERAL CIRCUIT COURT HAS POWER TO ENJOIN AN UNCONSTITUTIONAL INVASION OF PROPERTY RIGHTS ATTEMPTED BY STATE OFFICERS DEPENDS ON THE CHARACTER OF THE ACT SOUGHT TO BE ENJOINED, AND NOT ON THE TITLE OF THE OFFICERS OR TRIBUNALS ATTEMPTING TO PERFORM IT.

It will be a singular situation, if it shall eventuate in this matter that the same act, an act of exactly the same character—the act of enforcing confiscatory rates—can be restrained in the State of North Carolina, in the State of Minnesota, in the States of Texas, Iowa, Nebraska, Florida, Arkansas, North Dakota, and South Dakota, and the act of enforcing confiscatory rates cannot be restrained in the State of Virginia. If it be true, it must be because the nature of the Commission of Virginia is different from the nature of the tribunals making the attempt in the other States. The State of Virginia must have found a way to prevent what has been done in every court where relief has ever been asked; that is, must have found a way to confiscate the property of the Appellees over and above and beyond the power of the Federal circuit court to enforce the rights guaranteed to them under the Constitution of the United States; and it must have found it, not by reason of legislation and power of the United States, but by reason of

legislation and power of the State of Virginia. In other words, it must have found a way by state action to destroy the Fourteenth Amendment to the Constitution of the United States, declaring that no State shall deprive any person of property without due process of law, nor deny to him the equal protection of the laws. The Appellants contend that the State of Virginia has found a way to do it, to the extent of putting the case beyond the jurisdiction of the Circuit Courts of the United States. In every other state in the Union, the Circuit Court of the United States is powerful to give to a person the protection of the Constitution. In the State of Virginia, according to the contention of the Appellants, the Circuit Court of the United States is prevented from giving the protection of the Constitution of the United States to a property-holder, if that property-holder be a railroad company. The whole argument relied on by them, when sifted down to its last analysis, is that the constitutional system of Virginia has found a way of absolutely excluding from the circuit courts of the United States a transportation company whose property is being confiscated. That is a serious proposition. Here is a body, possessing, if it is a valid and constitutional body, the whole power of confiscation, from the initial step to the final judgment—from the inauguration of the scheme and the adoption of the means of confiscation, down through the power of accomplishing confiscation—the executive function, the ministerial function, the legislative function, and the judicial function—possessing them all—and yet, at no point along the progress of confiscation—at no point where there is an executive step, at no point where there is a ministerial step, at no point where there is a legislative step, at no point where there is a judicial step—can the Circuit Court of the United States give to a property-holder relief against confiscation. The Appellants contend that the Circuit Court of the United States has been deprived of its jurisdiction by the constitutional system of Virginia, and, although there may

be an admitted case of depriving a person of his property without due process of law, although the Constitution of the United States says that no State shall do this—the Appellants contend that tribunals of the United States—the Circuit Courts of the Union, that were established for the purpose of enforcing the constitutional rights of persons within their jurisdiction—have been paralyzed, not by the act of the United States Government through any of its departments, but by the constitutional system of the State of Virginia. Such a proposition as that may well appall us. The idea which we hear sometimes—not so often now as heretofore, but the idea which we still sometimes hear—that a court of the United States is not a court of the citizens of a state, that it is a sort of foreign tribunal to which no one ought in conscience to resort, will find splendid demonstration if this constitutional system shall be interpreted in the way here contended for; and that right which we have, as citizens of this whole country—the right to regard the Circuit Court of the United States as a court of our own to which we may go for the assertion and vindication of fundamental rights—will be denied us by this plan, by this constitutional arrangement, by this state action, which, in no improper or offensive terms, may be designated the device contained in this constitutional system. Can that be true? Can it be true that here at last a way has been found of breaking down the judicial system of the United States, and, by the action of a State, denying to the Appellees protection in the State of Virginia from the same kind of thing from which they could get protection in the Circuit Courts of the United States in every other State of this Union? The Appellees can protect their property in the Circuit Courts of the United States from confiscation in North Carolina; in Florida; in Texas; in Kansas; in Arkansas; and in South Dakota; but the same thing that is forbidden as an act of oppression as against persons in these States is, if the Appellants are sound in their contention, permitted in the State of Virginia. It is an appalling proposi-

tion, that on the North Carolina side of the Virginia-North Carolina line persons can come into the United States Circuit Court and get protection from an act, from which, if committed a few miles over the line in the State of Virginia—the same act, possessing the same qualities, freighted with the same results—they cannot come into that court and obtain relief. We submit that it is impossible to accept as sound any proposition that involves these immense consequences—consequences which would result in the destruction of the judicial power vested by the Constitution in the inferior Federal courts created, pursuant to the Constitution, by Congress. Suppose this court finds that it must sustain the propositions which the Appellants present—suppose then each State of the Union adopts them in succession—then *by the mere form of state action* two thousands of millions of dollars of the invested property in the United States is deprived of the protection of the circuit-court system of the United States, and that system, as a method of protection of property, is destroyed throughout the Union. Is it improper repetition to say that the consequences of the contention made here by the representatives of the Appellants are simply appalling, when considered in connection with the character and purpose of our judicial institutions?

The Appellees are unable to accept that proposition. Before, however, entering into an examination of it in detail, and giving an analysis of this Virginia system, we desire, in the first place, to point out what will be the principle on which we rely to show that this constitutional device has not had the effect of destroying the protection of the Constitution of the United States, through its circuit courts, which the Appellants are seeking to establish; that it has not had, and cannot have, the effect of depriving all the Federal circuit courts throughout the territory of the United States of this important jurisdiction.

This Commission, established by the Constitution of Virginia, has been defined by the Supreme Court of Appeals of

the State of Virginia. As we have seen, it is held in the case of Norfolk & Portsmouth Belt Line Railroad Co. *v.* Commonwealth, 103 Va., 294, that this body, the State Corporation Commission of Virginia, is clothed with legislative, judicial and executive powers. This is contended for on the part of the Appellants, and it is not only admitted, but it is contended for on the part of the Appellees,—that all these duties, executive, legislative and judicial, are combined in this body.

Therefore, it is admitted on both sides, and it is held by the highest court of the State of Virginia, that the executive, legislative and judicial functions are combined in this body, and that the Commission is endowed with the power of exercising them all. When a court proceeds to enjoin the enforcement of a rate as confiscatory, it enjoins an act embraced within those powers. Without stopping now to consider whether it be this power or that power, it is certainly a power which in terms is conferred upon the Commission by the Constitution of Virginia. So that this Commission of Virginia exercises and performs the kind of acts that a circuit court of the United States would, in other cases, enjoin. When this court sanctioned an injunction in the Texas, Nebraska, North Carolina, and Minnesota cases, and in cases from other States, against the enforcement of a rate, it sanctioned an injunction against exactly the same act which the Corporation Commission of Virginia performs, so that, if the court below was not authorized to enjoin this act when attempted by the Commission of Virginia, it was not on account of the character of the act. It is the same character of act the United States circuit courts have uniformly enjoined. If the difference is not to be found in the character of the act, it must be found, if at all, in the character of the tribunal which performs it. It must be, in other words, on the ground that, in addition to the power, the exercise of which is capable in ordinary cases of being enjoined, the Virginia Commission possesses some additional powers, which prevent the United States court

from reaching it by injunction; and that is what is contended for by the Appellants. They contend that the court below could not enjoin this act because the Commission is clothed with judicial power and with legislative power, and that because it is clothed with judicial power and legislative power, its administrative, ministerial and executive acts are beyond the reach of a court of chancery. On the contrary, the Appellees insist that the question whether or not an injunction may properly issue in any case is determined by the character of the act sought to be enjoined, and not by the name, or the other powers, of the tribunal that is attempting to perform or execute that act; that a body, possessing judicial powers, in the performance of an executive or ministerial act can be enjoined, although it cannot be enjoined in the performance of a judicial act; and, that a body possessing legislative powers can, in the performance of a ministerial or administrative act, be enjoined, although the acts of a legislature as such are beyond the reach of a court's injunction.

We refer to the case of Weil *v.* Calhoun, 25 Fed., 865. On page 868 is set out the contention of the defendant against an injunction; viz., that the defendant was a state court and that the act of Congress prohibited a United States judge from granting an injunction to restrain a court of any state. The court said (p. 870):

> "The first question I am to decide is that of the jurisdiction of this court, and whether it is prohibited, in cases like this, from acting at all by section 720 of the Revised Statutes.
>
> "Whatever may be the *status* of this case on the subject of jurisdiction, by reason of the residence of some of the parties in Tennessee, * * * yet it is certainly true that the charges in the bill do make a federal question, since the whole *gravamen* of the case is the charge that the complainants are about to be deprived of important property rights by the attempt of the defendant to declare in operation a pretended law which is charged to be in violation of the consti-

tution of the United States in two or three of the provisions of that constitution.

"Under the act of 1875, the circuit courts are, in express terms, declared to have jurisdiction in all cases over $500, where a right is claimed under the constitution and laws of the United States. It is said that under section 720 of the Revised Statutes this court cannot grant the prayer of this bill, because the ordinary is a state court, and that section prohibits any federal court from enjoining a court of any of the states, under any circumstances. I do not think the ordinary, in the performance of the duties provided by this act of 1885 of the Georgia legislature, is a court, in the sense of that section. The universal practice of the states is to have some branch of the executive department to determine the results of an election. Indeed, all officers performing such duties are part of the executive department, and yet in all the states the rule is imperative that the executive and judicial departments should be kept distinct. Whether officers of this kind are not exempt from the process of injunction, on the ground that though not courts or judicial officers, yet because they have duties to perform requiring discretion and judgment, the courts, by injunction, will not interfere with that performance, is another question which I will discuss further on in this opinion. Having, as I think, for this reason, jurisdiction of this case, I proceed to decide the questions made and argued so ably and exhaustively before me."

There was a court of the State of Georgia, not only denominated a court but exercising in some matters purely judicial functions—established for the real purpose of exercising judicial functions—but also clothed with a duty of a ministerial nature. The court decided in the case that the ministerial act was not put beyond the power of the injunction of the federal court by the fact that, in addition to the ministerial duty, the tribunal was charged with judicial powers and duties. If, then, the act enjoined here is not of a judicial nature, but is of an administrative or ministerial

nature, the fact that this Virginia Commission is attempted to be clothed with judicial functions in addition to its ministerial functions will not prevent the courts of the United States from looking at the substance of the act complained of and determining its jurisdiction by the nature of such act, no matter what the State may call the tribunal which is being enjoined. In the case just quoted an executive or ministerial act of a court was enjoined notwithstanding section 720 of the United States statutes. On the same principle is the fact that the Virginia Commission is also clothed with judicial functions a valid reason why its executive or ministerial acts should not be enjoined?

We now quote from the case of August Busch & Co. *v.* Webb, 122 Fed., 665:

> "The contention of the defendants that the commissioners' court of Grayson county is a court within the meaning of the law, and that their action cannot be restrained by an injunction, as contemplated by section 720 of the Statutes of the United States, to my mind, is without merit. The duty of said body to declare the result of said election and to publish such result is purely ministerial, and in nowise judicial. It is true that many duties of a court proper are ministerial, but they are clothed with judicial functions, such as deciding litigated questions between litigants, etc. The commissioners' court is not a court, in my opinion, within the meaning of said article 720 of the Revised Statutes, and therefore this contention cannot be sustained."

Although the commissioners' court, in the case just mentioned, was clothed with the judicial function of deciding matters between litigants, still, in the ministerial matter of declaring the result of an election, the fact that it was a court did not prevent the Federal court from stepping in and enjoining the ministerial or administrative function of the court.

We refer now to the case of Louisville & Nashville Rail-

road Company *v.* Brown, 123 Fed., 948 (opinion by Judge Pardee). The Florida Commission act in that case (Acts of Fla., 1899; chapter 4700) provided in section 8 that the Commission, before changing, revising or adopting any schedule of rates, should give public notice in such newspapers, and for such time, as the Commission might deem fair and reasonable; that all railroad corporations and persons interested should be entitled to a just and fair hearing, and that whenever any full schedule should have been made, the Commission should in every instance give the date on which the same should go into effect. By section 22 the railroad commissioners were endowed "with judicial powers to do, or enforce, or perform any function, duty or power conferred upon them" by the act, "to the exercise of which judicial power is necessary." In no respect, up to the point of the making of these rates, are the powers of the Virginia Commisison different from the powers of the Florida Commission. The Virginia Commission is required to give notice and to have a fair and just hearing before it fixes a rate. The Florida Commission is required to give notice and to have a fair and just hearing before fixing a rate. The Virginia Commission is endowed with judicial powers. The Florida Commission is likewise endowed with judicial powers. While the Florida Commission did not have the power to enforce its own orders, and the Virginia Commission has power to enforce its orders, that question of the enforcing of the orders by judicial process has no relationship to the act so far done by the Virginia Commission, and so far done in the Florida case by the Florida Commission. What the Florida Commission had done was to fix the rates, and it was about to enforce them. What the Virginia Commission had done was to fix the rates, and it was about to enforce them. If there was any necessity for judicial powers in connection with that, if the notice and the hearing before the railroad commission involved judicial powers, then, by the express terms of the Florida act, judicial

powers were conferred upon the Florida Commission. If, in giving notice and having a hearing, it is necessary for the Virginia Commission to exercise judicial powers, then the Virginia Constitution confers upon it judicial powers. So that the two cases, up to this point, are exactly alike—the two systems of commissions' regulations are exactly similar in their terms and spring from exactly similar powers. You can measure one by the other—they are exactly coterminous—and there is no possibility of a distinction between them. Now, in the condition in which this Florida case was after the rates had been fixed and there was an attempt to enforce them; in the condition in which this Virginia case was, when there was an establishment of the rates and an attempt to enforce them—an application was made in the Florida case for an injunction, just as an application was made here for an injunction. Nevertheless, the Circuit Court without hesitation overruled the argument which Judge Pardee refers to in his opinion as the "main contention of the respondents," that the Commission was a state court within the meaning of Sec. 720 of the Revised Statutes of the United States, and awarded an injunction against the commissioners restraining them from enforcing the rates.

We now refer to a case in which the commission, called the "court of visitation," not only had the power of making rates but also the power of enforcing its orders; not only had the power of determining what the rates should be and the executive functions essential to the enforcement of them, but was required itself to sit as a court to enforce them. Western Union Tel. Co. *v.* Myatt (C. C. D. Kansas), 98 Fed., 341.

In that case it is said:

> "The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for *future observance*, the rates and charges for services rendered, is *wholly* a legislative or administrative function. The legislature may, in the first instance, pre-

scribe such regulations, and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction. As applied to this case, the power of the state to fix or limit the charges of telegraph companies for the transmission and delivery of telegraphic messages is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law and a denial of

> the equal protection of the laws, and therefore violative of the first section of the fourteenth amendment to the constitution, is a question for the courts."

We also refer to an Alabama case, where it is said:

> "It by no means follows that a duty is judicial because it is to be performed by a judge; if in its performance he does not exercise the powers that appropriately appertain to his judicial office, it is ministerial, and not judicial, although its performance requires the exercise of his judgment."
>
> *Ex parte* Candee, 48 Ala., 386, 399.

Also, to a Maryland case:

> "If its qualities make the act a judicial act, it continues to be judicial, no matter what official undertakes to perform it; otherwise, the test would be found not in the nature of the act done but in the official character of the persons assuming to do it, and there could then never be a question as to whether a designated act was an invasion of one governmental department of the province of another, because if the act became judicial by reason of being assigned to a judge for performance, you would have to go no further than to ascertain that it had been so assigned, and thereupon, no matter how obviously executive it might be, it would have to be treated as judicial."
>
> Roley *v.* Prince George's County, 92 Md. 150, 163; 48 Atl. 48.

That an act executive or ministerial in its character remains so although entrusted to a court having judicial powers is settled by the case of Upshur County *v.* Rich, 135 U. S., 467. The head note of the case is as follows:

> "An appeal, under a state law, from an assessment of taxes to 'a county court,' which, in respect to such proceedings, acts, not as a judicial body, but as a board of commissioners, without judicial powers, only authorized to determine questions of quantity, proportion and value, is not a 'suit' which can be removed

from the county court into a Circuit Court of the United States, and be heard and determined there."

At page 473, this Court says:

"In Pittsburg, Cincinnati, etc., Railway Co. *v.* Board of Public Works, 28 W. Va., 264, 270, they held that where the board of public works fixed the valuation of the property of a railroad company under the statutes, it simply acted as a county assessor does in assessing the property of individuals; and that the acts of both are merely ministerial, and not judicial in any proper sense of the term. After referring to a number of authorities on the subject, the court says: 'These authorities establish, beyond the propriety of controversy, that the action and decision of a designated officer or board, whether the same be a court or other body, in reviewing and correcting an assessment of corporate or other property for taxation, are no more judicial acts than the acts of the officer or authority making the original assessment. They also show that the decision or finding of such officer or board, even if the same be a court or other judicial tribunal, is not such a judicial act or judgment as can be reviewed by a supreme or appellate court possessing judicial powers only.'"

We also call attention to the decision of the Supreme Court of the United States in

Ex Parte Virginia, 100 U. S., 339,

where it is held that the act of a judge in selecting a jury is not such a judicial act as is beyond the process of the United States court.

In McNeill *v.* Southern Railway Company, 202 U. S., 543, the North Carolina Corporation Commission made an order requiring Southern Railway Company to deliver certain cars on a private siding. The railway company filed exceptions to the order and after a hearing the Commission overruled the exceptions, whereupon the railway company filed a bill in the United States Circuit Court to enjoin the

Commission from enforcing its order. The North Carolina law provided (Acts of 1899, ch. 164, secs. 1, 31): "That the said commissioners * * * are hereby created and constituted a court of record, and shall be known as the North Carolina Corporation Commission, and as such shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in this act." Nevertheless, the injunction sought was granted and on appeal to this court the decree was affirmed. In this McNeill case the point was made in this Court that the Corporation Commission was a court and could not be enjoined under Section 720, as will appear distinctly from the brief of counsel for the North Carolina Commission on page 547 of the reported case. Here, then, this court sanctioned an injunction against a non-judicial act of the Commission, notwithstanding that body had been denominated a court and endowed with judicial powers by the laws of the State.

The contention that the suit was forbidden by section 720 of the U. S. Statutes was made by the defendants in the lower court and thus disposed of:

> "True, the Corporation Commission of North Carolina is, in words, made a court of record, and it is conceded the Circuit Court of the United States cannot restrain a State court, but the Corporation Commission is vested with powers not judicial, some of which have been held to be legislative, some executive, and the restriction on the injunction of this Court as to State courts does not apply, especially inasmuch as the acts complained of and asked to be enjoined are not judicial acts. As to these acts it is a State agency, not acting judicially."
>
> Southern Ry. Co. *v.* Greensboro Ice, &c., Co., 134 Fed., 82, 94.

It is, we submit, settled by these authorities that a legislative or ministerial act is not made judicial by being conferred upon a court, and that a ministerial act is not put

beyond the reach of injunction because about to be done by a body possessing, in some other matters, judicial powers.

We now ask the attention of the court to this proposition:

IV.

IF AN ACT IS IN ESSENCE LEGISLATIVE IN CHARACTER, THE FACT OF A NOTICE AND A HEARING DOES NOT CONSTITUTE THE BODY PERFORMING IT A JUDICIAL BODY, AND DOES NOT MAKE THE ACT A JUDICIAL ACT. IF IT WOULD BE A LEGISLATIVE ACT WITHOUT NOTICE AND A HEARING, IT IS STILL A LEGISLATIVE ACT WITH NOTICE AND A HEARING. THE CLAIM OF THE APPELLANTS THAT THE NOTICE AND HEARING BEFORE THE ACT IS PERFORMED AND AS PART OF THE PROCESS OF PERFORMING THE ACT IS "ANTICIPATORY LITIGATION" AND JUDICIAL IN CHARACTER IS FUNDAMENTALLY UNSOUND.

In the Virginia Constitution the provision as to notice and hearing is this (sec. 156, sub-sec. *b*):

> "Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or

> more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; * * *."

Now, in the case of Reagan *v.* Farmers' Loan & Trust Company, 154 U. S., 362, the provision for notice is this:

> "Before any rates shall be established under this act, the commission shall give the railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done; and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases."

In no respect does the notice in the Virginia Constitution differ from the notice in the Texas statute. In no respect does the hearing in the Virginia Constitution differ from the hearing under the Texas statute. If, then, it is held, as it is in the Reagan case, that the notice and the hearing under the Texas statute does not prevent a Circuit Court of the United States from enjoining the commissioners from enforcing rates fixed after such notice and hearing, how can it be successfully contended that because a notice and a hearing is required by the Virginia Constitution no injunction will lie against the Virginia Commissioners to prevent the enforcement of the rates? If there is any difference between the two cases, it does not arise from the fact that there was a notice and a hearing, because the Virginia Constitution, in so far as it relates to notice and hearing, was evidently taken from the Texas statute. If the Virginia investigation before the fixing of the rates is judicial in nature, and, therefore, prevents the injunction of the Federal court, then what prevented the proceeding under the Texas statute,

where there was similar notice and hearing, from being judicial in its character, and, therefore, beyond the reach of the Circuit Court of the United States in the Reagan case? There can be no intelligent line of distinction between the two. And what does this Court say, in sustaining the injunction in the Reagan case? How does it define all that has taken place up to the time of the fixing of the rate and the attempt to enforce it? Does it for an instant countenance the idea that hearing after notice is part of a judicial act? Does it for a moment hesitate to put the injunction of the court upon the act of the Texas Commission, after this notice and this hearing? Or does it proceed to sanction the injunction without being influenced by the argument that it is enjoining a court contrary to section 720, because, in fixing this rate in the Texas case, there was a notice and a hearing required by the statute as a condition precedent to the fixing of the rate? The decree of the lower court awarding the injunction was affirmed, this Court saying, at pages 399, 400:

> "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one in-

dividual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. * * * "

"The challenge in the case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of *quasi* legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it."

Reagan *v.* Farmers' Loan and Trust Co., 154 U. S., 362.

So that this court, in the Reagan case, defined the distinction between the judicial function of passing on a rate which has already been made, and the *quasi* legislative function of fixing a rate. No matter by what method this latter function may be pursued, whether after notice and hearing, or without notice and hearing, it is legislative in its character.

The views thus expressed in the Reagan case are expressly reaffirmed in Smyth *v.* Ames, 169 U. S., 466, and are the settled law of this Court.

In Commonwealth *v.* Atlantic Coast Line R. Co., 106 Va., 61, the Supreme Court of Appeals of Virginia sets forth in its opinion and expressly adopts, as a part thereof, the opinion of the Commission, from whose decision the

appeal was taken, in which opinion the following language is used:

> "The commission, by section 156 (*b*), has conferred upon it the *legislative* authority to fix and prescribe rates and classifications, and to make regulations for transportation and transmission companies * * *. But, in the exercise of this *legislative* power, it cannot make its rates effective or put its regulations into force until it has summoned the company or companies to be affected before it."

So that the fixing of rates by the Commission, after notice and hearing, is held by the highest court of Virginia to be a legislative act.

Will any one contend that the fixing of a rate by a legislative body, without notice and hearing, if the avenue is left open to the courts to inquire into its reasonableness, is an unconstitutional exercise of legislative power? It cannot be denied that notice and hearing are not necessary in order to make the fixing of a rate a constitutional act. In other words, if the legislature should fix a reasonable rate, such rate is as valid without as with a previous hearing.

This was expressly held by Justice Miller in Chicago, Milwaukee & St. Paul Railway *v.* Minnesota, 134 U. S., 469, when he says:

> "I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the legislature to have given such notice if it had established such rates by legislative enactment."

See, in this connection, Southern Pacific Co. *v.* Board of R'd Com'rs, 78 Fed., 236, at pages 259 and 260.

The fact that there has been required, as a condition prece-

dent to the fixing of the rate, that there should be a notice and a hearing does not transform that which in essence is legislative into that which in essence is judicial.

What is the essential characteristic of the fixing of a rate? Is it judicial in character, or legislative in character? If it is legislative in character, that character can not be varied by the method by which the legislation is performed. It is legislation if done by the legislature itself; it is legislation if done by a commission under the authority of the legislature; it is legislation if done without notice and a hearing; it is legislation if done after notice and a hearing. It is the character of the act which is determinative of whether or not it is legislation or judicial action.

It is said in the case of the Interstate Commerce Commission *v.* Cincinnati, &c. Railway Co., 167 U. S., 499:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

That a court will not hesitate to take jurisdiction of a case where is questioned the constitutionality of an act fixing a rate that has been fixed after notice and a hearing is, in addition to the Reagan case, further illustrated and established by the case of Chicago, Milwaukee and St. Paul Ry. Co. *v.* Tompkins, 176 U. S., 168. In that case it is said:

> "On August 26, 1897, the board of railroad commissioners, having taken the preliminary steps required by the statute in respect to notice, etc., made and published its schedule of maximum charge for the control of all local railroads."

Thus, in the Tompkins case, the schedule of rates was made after notice and hearing; yet the decree of the Circuit Court dismissing the bill was reversed and the case

remanded to the lower court for the taking of further testimony, which resulted in the granting of a perpetual injunction against the putting into effect of the rates. Chicago, &c., R. Co. *v.* Smith, 110 Fed., 473.

The proposition now being considered is admirably expressed in the case of Western Union Telegraph Co. *v.* Myatt, 98 Fed. Rep., 335, where it is said (p. 341):

> "The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for *future observance*, the rates and charges for services rendered, is *wholly* a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations, and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein.

When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction. As applied to this case, the power of the state to fix or limit the charges of telegraph companies for the transmission and delivery of telegraphic messages is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law and a denial of the equal protection of the laws, and therefore violative of the first section of the fourteenth amendment to the constitution, is a question for the courts." (Pp. 341, 342.)

"It was argued at the bar on behalf of the defendants that the powers conferred upon the court of visitation are judicial in their character, for the reason that the law contemplates an investigation and consideration on the part of the court before final action is had; and it is particularly recalled that such contention was made with reference to paragraphs 8 and 9 of section 8 of the act, which authorize the court of visitation to 'prescribe rules concerning the movements of trains to secure the safety of employés and the public, and to require the use of improved appliances and methods to avoid accidents and injuries to persons.' Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. *Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice.* It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and opinions of men having special knowledge of matters to be affected by proposed legislation constitute in any sense the exercise of judicial functions, or that such committees are

judicial tribunals. Nor does it follow that, because the exercise of the powers conferred upon the court of visitation requires the use of judgment and discretion, such powers are judicial in their nature, as that would make every executive act and legislative act requiring judgment and discretion a judicial act" (p. 345).

See also Louisville and Nashville Railroad Co. *v.* Brown, 123 Fed., 948, in which case, notwithstanding a notice and a hearing were required by the law under which the rates complained of were fixed, and notwithstanding the fact that if such notice and a hearing could be construed to make the proceeding judicial (which we deny), the Florida Commission was in respect to such notice and hearing invested with judicial powers, the court declined to consider the case as in any way judicial and enjoined the rate.

The same course was pursued under similar circumstances in Chicago & N. W. Ry. Co. *v.* Dey, 35 Fed., 866; Chicago, &c., Ry. Co. *v.* Becker, 35 Fed., 883; Northern Pacific Ry. Co. *v.* Keyes, 91 Fed., 47; Chicago, &c., Ry. Co. *v.* Smith, 110 Fed., 473; Metropolitan Trust Co. *v.* Houston, &c., R. Co., 90 Fed., 683; Kansas City S. Ry. Co. *v.* B'd of R'd Comm's, 106 Fed., 353; Wallace *v.* Arkansas Cent. R. Co. (C. C. A.), 118 Fed. 422.

See also, in support of this proposition, Houston, &c., R. Co. *v.* Storey, 149 Fed., 499; Perkins *v.* Northern Pacific Ry. Co., 155 Fed., 445; Railroad Commission of La. *v.* Texas, &c., R. Co. (C. C. A.), 144 Fed., 68.

In the last cited case, the Commission had made an order fixing a rate, and, upon complaint of certain shippers, had a hearing upon due notice to the appellees, which resulted in an order fining the appellees for disobedience to the previous order. The railroad companies then filed their bill in the United States Circuit Court to restrain the Commissioners from enforcing the order imposing the fines. The Circuit

Court granted the injunction, and the decree was affirmed in the Circuit Court of Appeals.

See also McNeill *v.* Southern Ry. Co., *supra*, and Mississippi Rd. Com. *v.* Illinois Central R. Co., 203 U. S., 335.

It being thus definitely established by these authorities that a notice and a hearing before a rate is made are not judicial but are part of a legislative act, the enforcement of which will, in case the rate is confiscatory, be enjoined, there is no room for the contention that this notice and hearing before the rate is fixed are "anticipatory litigation," judicial in character, amounting to due process of law. This term "anticipatory litigation" is the new term coined by counsel for the Appellants in the hope of transforming a legislative into a judicial act. They say that it is provided in the constitutional system of Virginia that there shall be litigation in advance of the fixing of the rate; that, before the status is established, and before there is a case, they have found a sort of anticipatory litigation which will establish and satisfy the requirements of due process of law. If so, then the Supreme Court of the United States was singularly oblivious to the merits of that "anticipatory litigation" in the Reagan case.

In that case, we have seen, this Court, in dealing with a rate made after all this "anticipatory litigation" had been gone through with—the notice and hearing being had under a provision from which the provision of the Constitution of Virginia as to notice and hearing was taken—held that nothing that had been done in such notice and hearing or in fixing the rate was due process of law and that the rate fixed after such notice and hearing was subject to the injunction of the Federal Court.

There was similar "anticipatory litigation," as we have seen, in the case of Chicago, Milwaukee & St. Paul Ry. Co. *v.* Tompkins, 176 U. S., 168. In that case there was another notice and hearing, another examination of witnesses, and another investigation into the reasonableness of the rates, and a determination by a legislative act that they were

reasonable, and thereafter a fixing of them by a legislative act.

As we have seen, this court reversed the decree of the Circuit Court dismissing the bill which sought an injunction, and remanded the case for further investigation of the constitutionality of the rates which were the result of this "anticipatory litigation." The result was a perpetual injunction against the putting into effect of the schedule of rates. Chicago, &c., R. Co. *v.* Smith, 110 Fed., 473.

So also, the fact that there had been "anticipatory litigation" did not prevent the award of an injunction in Western Union Tel. Co. *v.* Myatt, *supra;* Chicago, &c., Ry Co. *v.* Dey, *supra;* Northern Pacific Ry. Co. *v.* Keyes, *supra;* Metropolitan Trust Co. *v.* Houston, &c., R. Co., *supra;* and in the other cases above cited.

In the case of Norwalk Street Railroad Company's Appeal, 69 Conn., 176, the court says:

> "For example, the power to make laws may require the accurate ascertainment of facts. For this purpose witnesses must be summoned, examined, and conclusions drawn from their conflicting testimony. This is a means peculiarly appropriate to the judicial power and the ear mark of that power. Yet, when so employed by the legislature without violation of other constitutional provisions, it is a means within the limits of legislative power, but should the legislature after the passage of an act attempt by another act to adjudicate the rights of parties which have arisen under its provisions, such act, although only means appropriate to legislation might be employed, would be an exercise of judicial and not of legislative power. It would be void because it involved the union in the same magistracy in respect to the same matter of the functions of judge and legislator."

And in the case of United States *v.* Ferreira, 54 U. S., 13 How. 48, this court said:

> "The powers conferred by these acts of Congress upon the judge as well as the Secretary are, it is true,

> judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as on a commissioner. But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

If it were possible by merely conferring certain powers, which for their exercise require consideration and judgment, but which have reference to rules of future conduct and not to the ascertainment of the reasonableness and validity of laws already enacted, upon courts, and thereby render the exercise of such powers conclusively lawful, then the result would follow that it would be possible for a State to abolish the whole jurisdiction in respect to such matters of the circuit courts of the United States. In other words, an act which is legislative because prescribing a rule of future conduct remains so although conferred upon a court. What legislative act is there in reference to which a State can not competently require an investigation and a determination upon the reasonableness and propriety of it before it is enacted? If so doing precludes the circuit courts of the United States from inquiring into and ascertaining whether or not the act when accomplished is contrary to the Constitution, then it is possible for every legislative act that is enacted by the legislature of that State to be taken out of the constitutional jurisdiction of the Federal courts of the United States. In other words, it would be possible for the whole jurisdiction in equity conferred upon the circuit courts of the United States in respect to any act of a state, as a contrary to the Fourteenth Amendment, to be abolished, not by a law of Congress, but by the laws of a State. Thus, by the simple expedient of "anticipatory litigation,"

by which only is meant a notice and a hearing before a legislative body, the whole framework of the jurisdiction of the circuit courts of the United States as established by Congress would be destroyed,—a result which would be accomplished by the device of the State and not by the enactment of Congress,—and the citizens of this country, entitled under the Constitution of the United States and the acts of Congress to come into the circuit courts of the United States to obtain the protection guaranteed to them by the Fourteenth Amendment—to protect their lives, their liberty, or their property from unconstitutional invasion—would be turned away from the doors of the Federal court by the simple device of "anticipatory litigation"—by the simple device of requiring a legislative committee or a legislative commission to act after a notice and a hearing.

But, in addition to the lack of power in a state to make for the Federal courts that which is in essence legislative or executive into that which is in essence judicial, we contend that:

V.

THE CONSTITUTION OF VIRGINIA HAS NOWHERE ATTEMPTED TO MAKE THE COMMISSION OF THAT STATE A COURT WHILE ENGAGED IN THE ACT OF RATE-MAKING, OR IN THE HEARING PREPARATORY TO RATE-MAKING.

We have thus far contended that it is impossible for a system of law to impose upon a tribunal of any nature a certain character of function and thereby change the character of the function; in other words, it is impossible to impose upon a legislative body a judicial function and make it legislative, simply because the body is legislative, when the function is judicial, and it is impossible to impose upon a court a legislative function and make it judicial, simply because it is imposed upon a court, and it is impossible to impose upon an executive a legislative or judicial function and make it executive simply because it is imposed upon an executive, the

nature and character of the act remaining unchanged, no matter on what sort of tribunal imposed.

We shall now try to show that the Virginia Constitution never attempted to impose judicial functions on the Commission of Virginia in respect to rate making.

In section 156 of the Constitution, sub-section *b*, it is provided as follows:

> "The commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classification of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car

service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company."

It will be observed that not any more in respect to rates than in respect to facilities, not any more in respect to rates than in respect to demurrage charges, not any more in respect to rates than in regard to the performance of any other public duty, or in regard to the other rules and regulations which the Commission may prescribe, is a notice or hearing necessary. The provision of the Virginia Constitution as to notice, etc., is as follows (sec. 156, sub-sec. *b*):

"Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement shall first be given by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement."

That is the only provision of the Constitution which could be relied on to make this Commission a court when engaged in the making of rates; and the only thing in it which is relied on to have that effect is the requirement for a notice and a hearing as a part of the investigation resulting in the final fixing of the rates. And this same paragraph provides for a notice and a hearing before any other rule or requirement shall be made by the Commission.

By sub-section *c* of section 156, of the Constitution, it is provided:

> "In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the commission, sitting as a court, and afforded opportunity to introduce evidence, and to be heard, as well against the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law."

This is the first place in the Constitution where the Commission is called a court. From this provision it is evident that the Constitution intended to confer upon the Commission the powers and authority of a court of record, to be exercised before any of its orders or requirements should be-

come final, only in respect to the administration of oaths, compelling the attendance of witnesses, the production of papers and the punishment for contempt of any person guilty of disrespectful or disorderly conduct in its presence while in session. The Constitution evidently further intended to confer upon the Commission the powers and authority of a court of record to enforce obedience to its lawful orders or requirements after they were made; but this latter power was to be exercised after the making of the rate, rule or regulation, and not before.

If it were intended that the Commission should act as a court in the making of the rate, why should the Constitution then provide for a subsequent consideration of the reasonableness of that rate before the same body? Can there be found in any constitution or statute or system of jurisprudence a precedent where a judgment already judicially ascertained and pronounced is required in the same instrument to be brought a second time before the same court, to pass on its validity, its justness and its reasonableness? If the Commission was acting as a court in making the rate, why does the Constitution require it to be brought again before that body, sitting as a court? And require it to do what? Not to enforce an order of the court, not to regard it as a finality and impose a penalty for its violation, not to regard the order as something already judicially done, judicially ascertained, and *res adjudicata*, but to do this: to bring it up before itself, sitting as a court, and afford the carrier "opportunity to introduce evidence and to be heard, as well against the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation." It at first appeared to be a difficult task to ascertain exactly what this Virginia Commission is. It presents itself in so many kaleidoscopic forms and shapes; it appears in such abnormal ways; it presents such new and novel views of government, that on first impression we were more or

less at a loss to know exactly what it is and what it is at any particular time. But when we find that in subsection *c* is the first time that the Constitution refers to this Commission as sitting as a court; when we see that the very thing that it had been theretofore empowered to do in some other capacity—in its legislative capacity—must now be brought before it, and its reasonableness and its validity and its justness inquired into by this Commission sitting as a court, it seems that we are obliged to conclude that it never sits as a court in respect to the making of rates or other orders until some of its orders previously made have been violated and it has the delinquent party before it, and sits as a court and to hear the specific case against him. Its powers are not only in respect to rate making. It has powers of visitation; of inspecting books; of inspecting roadways; of examining into the efficiency of station facilities; of considering schedules of trains. Is it acting as a court when it does any of these things—when it takes a trip over the road to examine the roadbed, is it still acting as a court? Is there some alchemy that destroys the inherent character of these functions, which would have a certain characteristic if performed by some other body, and makes of them all judicial functions, because performed by this body? If the Commission is not acting as a court when its members ride over the roads and look at the roadbed, when it requires reports from these carriers as to the condition of their properties,—if it is not acting as a court in the performance of these executive and administrative functions,—then, why should it be said that the Commission is acting as a court when it does the legislative thing of making a rule or a regulation or of fixing a rate? As to them all—as to the Commission's administrative functions, as to its legislative functions, as to its making a rule or its fixing a rate,—we find that the Constitution, after providing for the performance of those functions of a legislative and administrative character, at last hales the company before the Commission in its judicial capacity to have a determination

s to whether or not the accused is guilty of a violation of aw; then, for the first time, the Commission is said on the face of the Constitution to sit as a court; then, for the first time, it is required to inquire into the reasonableness of its own order, sitting as a court.—for the first time the Constitution attempts to make the Commission a court, when the justness and reasonableness of the rule or regulation which it has made, requiring the facilities, providing for the penalties, establishing the demurrage rule, fixing the rate, is inquired into, after summons, and, as it says, in a judicial way, before the Commission, sitting as a court.

But this matter has been settled by the Supreme Court of Appeals of Virginia in respect to this Commission. It will be remembered that under subsection (*b*) of section 156 there is no more requirement that notice shall be given and a hearing had in respect to the fixing of a rate than there is in regard to the making of a demurrage rule. The provision as to what notice is required is set out on page 41, *supra*. It provides that,

> "Before the commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies,"

it shall give notice and shall have a hearing.

So that there is no more requirement in the Constitution that there shall be a notice and a hearing about the fixing of a rate than there is about the enactment of a demurrage rule. Now, the Commission did enact a lot of demurrage rules. The carriers did not know what this Commission was; they did not know what the effect of a demurrage rule would be; they thought the Commission might be a court; and they took an appeal to the Supreme Court of Appeals of Virginia on these demurrage rules. There had been a notice and a hearing on the demurrage rules, just as there had been a notice and a hearing in respect to the making of these rates. Now, what did the court say in regard to

the nature of these demurrage rules in the case of Atlantic Coast Line Railroad Company *v.* Commonwealth, in 102 Va., at page 621:

> "We are further of the opinion that the question of their validity, so far as affected by the Constitution of the United States, may be raised and determined in any case in which that question could be raised and determined, if the rules and regulations in question had been enacted as statutes by the General Assembly, except as prohibited by subsection '*d*' of section 156 of the Constitution."

(which subsection is not in point here and has no relation to this matter).

So that, in effect, these regulations fixing rates, being on the same basis as regulations establishing demurrage rules, made after notice and a hearing, are here interpreted by the Supreme Court of Appeals of Virginia as possessing the qualities of legislative enactments, which can be inquired into in the same way as any other legislative enactment so far as the Constitution of the United States is involved. *

Taking that view of this matter, it puts this Commission in harmony with the other commissions all over the country, in respect to the function it is performing in the making of rates. The Commission of Texas, when it fixed its rates, was acting as a legislative body, so the Supreme Court of the United States said, in the Reagan case, *supra;* the Legislature of Nebraska was acting in a legislative capacity when it fixed the rates inquired into in Smyth *v.* Ames, *supra;* the Commission in Minnesota was acting in a legislative capacity when it fixed the rates in the case of Chicago, Milwaukee & St. Paul Ry. Co. *v.* Minnesota, *supra;* the Commission of South Dakota was acting in a legislative capacity when it fixed the rates in the case of Chicago, Milwaukee & St. Paul Ry. Co. *v.* Tompkins, *supra;* and this construction of the Virginia Constitution, here contended for, fixes the Corporation Commission of

* See addendum inserted at end of brief.

Virginia as acting in a legislative capacity when it fixed the rates in the cases now under argument. On the one hand we have everything to establish the soundness of this construction of the Constitution, while, on the other, we have everything to destroy the idea that the hearing before this rate regulation was made was "anticipatory litigation"; we have the authority of all these cases in which a notice was given and a hearing was had that it was not regarded as "anticipatory litigation"; we have the authority of all these cases that the injunction was properly granted for the purpose of stopping the enforcement of the rate, notwithstanding the notice and notwithstanding the hearing.

That the Constitution of Virginia is not to be construed as attempting to make the Commission a court in the matter of prescribing rates is further shown by the following extract from sub-section (*b*) of Section 156:

> "The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws."

From this extract it will be seen that the authority of the Commission in respect to rates is paramount, but it is not exclusive, and until the Commission acts the Legislature may prescribe a rate. The clause referred to indicates that there is no difference in essential character between the acts, in respect to which the authority of the Legislature is superior to that of the Commission, and the act of fixing a rate, in respect to which it is subject to the authority of the Commission—in both instances the acts are legislative in character.

It cannot be claimed that the intention to make the action of the Commission in fixing rates judicial can be gathered from the fact that its action in so doing is made subject to review on appeal to the Supreme Court of Appeals of the State, for the conclusive reason that a similar appeal is given from its decisions in establishing any other rules, regulations or requirements, as to which its action is made expressly subject to the superior authority of the General Assembly to legislate thereon by general laws.

That such an appeal lies is shown by sub-section (*d*) of Section 156 of the Virginia Constitution, as follows:

> "From any action of the commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon, or an increase thereof"

there may be an appeal as of right to the Supreme Court of Appeals. And this sub-section further provides:

> "The General Assembly may also, by general laws, provide for appeals from any other action of the Commission, by the Commonwealth or by any person interested, irrespective of the amount involved."

And the statute of Virginia passed in pursuance of this constitutional provision is as follows:

> "That the Commonwealth or any person aggrieved by any final finding, order, or judgment of the commission shall have of right, regardless of the amount involved, an appeal to the supreme court of appeals, same to be taken and perfected within six months from the date of such final finding, order, or judgment, * * *."

In addition to the foregoing considerations, it may not be amiss to give some illustrations to show where the proposi-

tion insisted on by the Appellants would lead. Suppose that instead of the Commission's having the right to make a rate on its own initiative, there had been a requirement in the Constitution, just as there is in the Interstate Commerce Act, that the rate could only be made on complaint of an individual, and that such a complaint had been filed against any railroad, or any number of railroads, before the Virginia commission, and suppose that the Constitution had required that the Commission before making the rate should give notice and inquire into the reasonableness and justice of it, giving an opportunity to the defendants to be heard. Suppose further that the parties complainant were citizens of Virginia and the parties defendant were citizens of a different state.

If the Virginia Commission in rate making and taking the steps incident thereto is a court and the result of this proceeding involving notice, and a hearing, could be a judicial decree, then we would have a cause removable to the circuit court of the United States on the ground of diverse citizenship, and the duty would be thrown upon the circuit court of the United States to make rates, in the face of the authority of Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 400, where it is said:

> "As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of the *quasi* legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it."

Moreover, if the Constitution of Virginia makes its Commission a court in respect to the making of rates, and the result of its action, after a notice and a hearing, is a judicial decree, and if there had been no appeal allowed to any higher court of the State (which appeal would not be necessary to due process of law), then an appeal might be taken from the Commission's decree in making the rate to this Court, and this Court would be face to face with the question of whether or not it would entertain an appeal from the action of rate making in respect to which no rights had accrued and no ordinary case at law had arisen.

Thus, from whatever standpoint we examine the character of the acts enjoined by the court below, whether from the standpoint of the inherent lack of power of the State of Virginia to change the character of an act by calling it by a different name, or whether from the standpoint of the Constitution itself, which draws a distinction as to the character in which the Commission sits when it is making a rate and the character in which it sits when it is inquiring into the guilt or innocence of a party as to disobeying the rule making a rate, we find that the act of making the rate, of giving the notice, and of having the hearing prior to making the rate, is legislative in character, and not judicial, and that the act of enforcing the rate is ministerial.

It follows as a corollary from this proposition that the Commission of Virginia is not all the time a court. It is not all the time clothed with the immunity of a court of justice created by Section 720 of the Revised Statutes. Whether it is ever so must be a matter for further argument. It suffices for the present purpose to show that it is not always so, and that it is not so in the matter immediately under discussion. If, then, it is not a court in the act of making the rates, or in the act of inquiring into their reasonableness before they are fixed as a rule of future conduct, why cannot that Commission be enjoined from enforcing these rates just as any other commission? We contend then:

First, that the Virginia Commission is not a court when making the rate or when inquiring, as a preliminary to making the rate, into the justice and reasonableness of the contemplated action, and that the rule establishing the rate when made is not a judicial decree, and, therefore, the validity of the rate is not *res adjudicata;*

Second, that, the Commission not being a court in the matter of rate making or in the matter of the preliminary steps incident to enforcing the rates which it has made, its members are not exempted from injunction by Section 720 of the Revised Statutes when attempting to enforce an unconstitutional rate. That the steps preliminary to enforcing an unconstitutional rate are ministerial in character and may be enjoined is hereafter discussed.

VI.

DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT REQUIRES THAT THE COMPANY COMPLAINING OF A RATE SHALL, AFTER IT IS FIXED, HAVE THE RIGHT TO A JUDICIAL INVESTIGATION BY DUE PROCESS OF LAW UNDER THE FORMS AND WITH THE MACHINERY PROVIDED BY THE WISDOM OF SUCCESSIVE AGES FOR AN INVESTIGATION JUDICIALLY OF THE TRUTH OF A MATTER IN CONTROVERSY.

There may be various matters about the inspection of milk, the licensing of doctors, and the condemnation of property, in which a judicial hearing more or less limited only is required, but as to the making of rates this Court has said what the proper method is and what is essential to due process of law. Before any rate can become conclusive and binding there must be a right to a judicial inquiry in a judicial court. In the case of Chicago, Milwaukee & St. Paul Ry. *v.* Tompkins, 176 U. S., it is said, on page 172:

> "When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad prop-

> erty" [that was some years ago], "the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

In the case of Chicago, Milwaukee & St. Paul Ry. Co. *v.* Minnesota, 134 U. S., it is said, at page 456:

> "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

At page 458:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and

effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Justice Miller, in the same case, on page 461, said:

"But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void."

The same principle is approved in the case of Smyth *v.* Ames, 169 U. S., 526 and 527, at the latter of which pages it is said:

"But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the state legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what

> it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

And, as was said by Justice Miller in the Minnesota case, 134 U. S., 418, 461:

> "The proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character"

and until the decree of the court in such equity cause is obtained it is not competent for each individual having dealings with the carrier, or for the carrier in regard to each individual who demands its services, to raise a contest in the courts over a question which ought to be settled in this general and conclusive manner.

This same proposition is approved by this Court in *Ex Parte* Young, 209 U. S., 166. See also St. Louis, &c., Co. *v.* Gill, 156 U. S., 649, 659, 666.

This Court has thus settled the law to be that due process of law requires the right to a judicial investigation under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy.

VII.

THE APPEAL PROVIDED FOR IN THE VIRGINIA CONSTITUTION TO THE SUPREME COURT OF APPEALS OF THE STATE FROM THE COMMISSION'S ACTION IN MAKING THE RATE COMPLAINED OF DOES NOT CONSTITUTE DUE PROCESS OF LAW, AND DOES NOT DESTROY THE EQUITY JURISDICTION OF THE FEDERAL COURTS TO GIVE RELIEF.

Ordinarily, every litigant has a right when a question arises under the Constitution of the United States to come at once into the Circuit Court of the United States for protection. Can it be necessary to discuss whether any action of a state can deprive a litigant of this right? If the Constitution of Virginia had provided for no appeal, if the doors of the chancery courts and the common-law courts of the State of Virginia had been left open, if the ordinary methods of pursuing these remedies through the state courts had not been abolished, then the way would have been clear for us to go into the Circuit Court of the United States on this constitutional question. When the Constitution of Virginia undertakes to abolish the power of all the *nisi prius* courts of the State to examine into this matter by providing that "no court of this commonwealth (except the Supreme Court of Appeals by way of appeal as herein authorized) shall have jurisdiction to review, reverse, correct or annul any action of the Commission within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties," does it at the same time abolish the rights of the Circuit Courts of the United States to inquire into it? If there had been a method provided by which we could have gone into one of the *nisi prius* courts of Virginia to assert our rights, and then there had been an appeal from that court to the Court of Appeals of Virginia, we would undoubtedly have had

the right to apply for relief to the Circuit Court of the United States, in the exercise of its concurrent jurisdiction. In that event we would have had both the jurisdiction of a *nisi prius* court in Virginia and the jurisdiction of the Court of Appeals in Virginia. In that event we would have had more rights in the courts of Virginia than we have now. Although in that case we would have had a larger opportunity of defense in the courts of the State, we would still have had the clear right of going into the Circuit Courts of the United States for the protection of our constitutional rights. The position of the Appellants in respect to this matter is therefore reduced to this, that because we have less rights in the courts of Virginia, therefore, we must have less rights in the Federal courts. If this is so, it must be because the jurisdiction of the Federal courts is subject to be affected by the laws of a state. This proposition would make the judicial system of the United States the mere sport and plaything of the legislation of the states. It would take away from the Federal system of jurisprudence the usefulness and power that it now has under the Constitution and the laws of Congress to hold out to the weak and the oppressed the protection of the Constitution of the United States. It is a claim that the state can endow itself with the power of oppression and tyranny,—the power to violate the Constitution of the United States,—and in the same breath take from the oppressed the protection of the Constitution as enforced in the Federal courts. No such proposition as this can be sustained. In the case of Smyth *v.* Ames, 169 U. S., 474, we find a quotation from the statute of the State of Nebraska which provides the following remedy:

> "Whenever any railroad company or companies in this State shall, in a proper action, show by competent testimony that the schedule of rates prescribed by the act are unjust and unreasonable, such railroad or railroads shall be exempt therefrom as hereinafter provided. All such actions shall be brought before the Supreme Court, in the name of the railroad com-

> pany or companies bringing the same, and against the State of Nebraska, and upon the hearing thereof, if the court shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action, (it) may issue their (its) order directing the Board of Transportation to permit such railroad to raise its rates to any sum in the discretion of the Board."

It was claimed in that case that there was a remedy under the laws of the state, that that remedy ought to be pursued, and that it was exclusive of the remedy in the Federal courts. But Justice Harlan, in delivering the opinion of the court, says this (page 516):

> "We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States" [quoting authorities]. "But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction." * * *
>
> "So, 'wherever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citi-

> zen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.' "

This proposition applies of course not only to matters of diverse citizenship, but to the whole field of jurisdiction of the circuit courts of the United States, including questions arising under the Constitution and laws of the United States, for the court said:

> "Whenever the jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction."

In addition to that case, we desire to call attention to the case of Mississippi Mills *v.* Cohn, 150 U. S., 202, where the court says (p. 204):

> "It is well settled that the jurisdiction of the Federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation. Though by it all differences in forms of action be abolished; though all remedies be administered in a single action at law; and, so far at least as form is concerned, all distinction between equity and law be ended, yet the jurisdiction of the Federal court, sitting as a court of equity, remains unchanged. Thus, in Payne *vs.* Hook, 7 Wall. 425, 430, it was said, citing several cases: 'We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States can not be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power." If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union.' And in McConihay *v.* Wright, 121 U. S., 201, 205: 'The contention of

the appellants, however, is that by the statute of West Virginia the complainant might have maintained an action of ejectment. Reference is made, in support of this contention, to the West Virginia Code of 1868, c. 90, to show that an action of ejectment in that State will lie against one claiming title to or interest in land, though not in possession. Admitting this to be so, it, nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several States regulating the practice of their own courts.'" * * *

"So, conceding it to be true, as stated by the learned judge, that the full relief sought in this suit could be obtained in the state courts in an action at law, it does not follow that the Federal court, sitting as a court of equity, is without jurisdiction. The inquiry rather is, whether by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States, the relief here sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give."

And in Reagan *v.* Farmers' Loan & Trust Company, 154 U. S. 391, it is said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of the State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal Courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers,

> to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts."

We repeat that it cannot, of course, be claimed that it was intended to be said in these cases that the principle announced in these authorities should be confined to suits between citizens of different states. It extends to and takes in the whole field of Federal jurisdiction. For, under the Constitution and laws of the United States, Federal jurisdiction founded upon diverse citizenship stands on ground no different from and no higher than that in respect to questions arising under the Constitution and laws of the United States. The United States statute on that subject is as follows:

> "That the Circuit Courts of the United States shall have original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or * * * in which there shall be controversies between citizens of different states."

In the light of these authorities, it may be considered as settled that the jurisdiction of the Federal courts in equity is neither impaired nor diminished by the appeal provided for in the Virginia state law from the action of the Virginia Commission prescribing rates.

VIII.

THE CIRCUIT COURT OF THE UNITED STATES HAD JURISDICTION IN EQUITY TO CONSIDER AND DETERMINE THESE CASES.

The question of whether or not the Federal circuit courts have jurisdiction in equity over the matter here in controversy must be considered as it now stands before the remedy by appeal in the state court is availed of—before the Supreme Court of the state obtains jurisdiction of the case. The question is whether, before the remedy in the state court is availed of, the Federal courts, under the rules of the High Court of Chancery of England, and under the established rules of equity jurisprudence, have jurisdiction. The principle upon which this equity jurisdiction is founded requires the court to discard whatever remedy may be found under the state law, whether at law or in equity, and to determine whether, looking at the situation as it is when the case is brought into the Federal court, it has jurisdiction to give relief in equity. If this were not so, then the Federal jurisdiction would be diminished by state legislation.

We proceed therefore to consider whether, notwithstanding the appeal which the Constitution of Virginia purports to give, there is equity jurisdiction of the case in the United States Circuit Courts under the rules governing that branch of juris-prudence.

1. It has been settled by this Court that in these cases in which is questioned the validity of a state-made rate, equity has jurisdiction in the interest of the public welfare, which requires the reaching of an orderly, comprehensive and final establishment of a basis of doing business in which the whole public is interested. This proposition, establishing jurisdiction in equity in such cases, grows out of the nature of the inquiry itself, involving as it does a great multiplicity of transactions and constant dealings with the whole public, and

involving the impracticability of settling the question comprehensively and finally by a suit between the company and any one individual. Thus, it is said by Justice Miller in Chicago, Milwaukee & St. Paul Ry. Co. *v.* Minnesota, 134 U. S., 460:

> "That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, * * *.
>
> "That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

These propositions announced by Justice Miller are quoted with approval by this Court in *Ex parte* Young, 209 U. S., 166, this Court in the Young case distinctly holding:

> "Such remedy" [*i. e.*, a suit in equity] "is undoubtedly the most convenient, the most comprehensive and the most orderly way in which the rights of all parties can be properly, fairly and adequately passed upon."

2. One unquestioned ground of equity jurisdiction is the avoidance of a multiplicity of actions. Such multiplicity is inevitable under the express terms of the Virginia Constitution. That Constitution expressly provides in sub-section (*h*) of Section 156, as follows:

> "The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit, or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the commission may impose, or be authorized to impose, upon

> such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the commission."

In the effort to enforce the rates complained of, there will be turned loose upon each of these transportation companies many thousand litigants a day. Every person buying a ticket of the company for an intrastate journey would have a right to sue at law and get judgment against it. This is the multiplicity of actions to which reference is made in all these cases as a basis of equity jurisdiction.

But, while we can not be required to do so, we can go one step further. Let us bear in mind for a moment that the Federal jurisdiction in equity, established to relieve against a multiplicity of actions, would not be defeated if there were provided a state jurisdiction in equity which could likewise enjoin this multiplicity of actions, and, therefore, *a fortiori*, could not be defeated by the provision authorizing an appeal.

The provisions of the Virginia Constitution expressly permitting a multiplicity of actions has just been quoted.

Suppose, now, we look at the situation as it would be if we adopted the state remedy of appeal. Do we by that method avoid this multiplicity of suits? Do we suspend this law by an appeal in such a way as to prevent suits against us by every patron of the road? By no means. In the same sub-section (*h*) of Section 156 it is provided:

> "But in no such proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the commission, within the scope of its authority, and then in force, be questioned: *provided, however,* that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof."

In other words, we are not protected even by the remedy in the Court of Appeals from the multiplicity of suits, nor are we protected from the necessity of making defense in these suits. We are only given by the Constitution the benefit of a plea that will not answer the suit, but will simply stay the trial of it until the Court of Appeals passes on the appeal which has been presented. We can be sued by tens of thousands of people, and there is laid upon us, by this Virginia system, the necessity to go into tens of thousands of suits and file our plea of the pendency of an appeal in order that we may stay the proceedings in that great multiplicity of actions. The courts are not permitted to take judicial notice of the pendency of the appeal, nor are the plaintiffs prevented from obtaining a valid judgment if the defense of the pending appeal is not pleaded, for the Constitution expressly provides that transportation companies can only stay the course of these suits by filing an objection in each of them. The affirmative action of going into every one of these suits and pleading the pendency of an appeal and objecting to the hearing must be taken by the defendants before the actions can be stayed. The rule giving jurisdiction to courts of equity to prevent a multiplicity of suits is not against the trial of those suits—it is against being *vexed* by a multiplicity of suits. Under this system, we have to go part of the way through the trial of each and every suit that may be instituted against us. We would be required to go into every community through which the road runs, into every justice's court, and into every *nisi prius* court, to make our defense up to and including the point of pleading and objecting to the present hearing of the suit, and thus to bear the burden of this multiplicity of suits, even under the remedy of appeal which has been provided.

A transportation company under the Virginia system may be subjected to a great variety of actions for disobedience to a rule establishing a valid rate, viz.:

(*a*) To an action by the injured party for a penalty.

In clause 3 of section 1294*d* of Pollard's Virginia Code it is provided:

> "If the railroad company shall, after payment or tender of the lawful tolls or charges, fail, or refuse to receive or to transport, or to deliver in a reasonable time, any property so delivered or offered, or fail to take up or set down any passenger at such depot or other regular stopping place of a train scheduled to stop at such depot or place, as he may desire, or if the said company shall demand and receive more than is lawful, **it shall forfeit to the injured party a sum,** to be recovered by motion or action, of not less than twenty-five nor more than one hundred dollars."

(*b*) To an action for damages on the civil side of the court.

Neither of the above is relieved against if an appeal is taken, as above shown.

(*c*) To a fine by the Commission, in case no appeal is taken and the action of the Commission suspended, of not exceeding five hundred dollars per day for each day's non-compliance.

> Constitution of Virginia, Sec. 156 (*a*); Pollard's Virginia Code of 1904, Sec. 1294*c*, sub-sec. (23).

(*d*) To an indictment by the Commonwealth of Virginia for each refusal to carry at the prescribed rate or for carrying at a higher rate, the fine provided for being not less than ten nor more than five hundred dollars.

> Pollard's Virginia Code, sub-section 70, Section 1294*d*.

3. Moreover, there is no adequate remedy at law, even under the remedy of appeal given in the Constitution of Virginia. In order to avail of the right of appeal given by the Constitution of Virginia, the appealing company must, under

sub-section (*g*) of Section 156, submit itself, in case its appeal is successful, to the establishment of a rate in respect to which it has had no hearing, for the reason that the above mentioned sub-section provides that the reversal order shall not be valid unless the court of appeals shall at the same time substitute therefor such order in respect to the rate as in its opinion the Commission should have made.

In respect to the matter just mentioned, a more extended comment may be justified. It can hardly be claimed that any remedy by appeal is adequate when the only unconditioned right that the Supreme Court of Appeals is given is to decide the case against the appellant. It may affirm the Commission without condition, but if that Court is of opinion that the Commission is wrong it is not permitted simply to reverse the Commission. It is not permitted to confine itself to its judicial function. It cannot do what this Court says, in the Reagan case, 154 U. S., 400, a court may do, namely:

> "The challenge in the case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of the *quasi* legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections."

The Supreme Court of Appeals is not allowed by the Constitution of Virginia to pursue that course. On the contrary, it is required, "at the same time" it enters its order of reversal, to make a new schedule of rates, or its order of re-

versal shall be void. In sub-section (*g*) of Section 156 it is provided:

> "Whenever the court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such order as in its opinion, the commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid."

If, then, it decides in favor of the appellant and reverses the Commission, it must at once abandon its judicial function, transform itself into a legislative body, and make a schedule of rates, which is declared not to be a judicial function by the Supreme Court of the United States.

Moreover, this rate is made without a hearing. Thus, in the Commission's notice of July 31st which began the making of the rate in question, the Commission gave notice only that it would at a day and time fixed, hear and consider any objections which might be urged "against a rule, regulation, order or requirement of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers." The matter involved in the issue thus made was a maximum rate of two cents, and "the method, time and extent of promulgation and putting into effect of the same." Suppose the court of appeals on appeal were to find the two cent rate too low and were to conclude to put into force a two and one half cent rate. Suppose, on the contrary, it should say that the two cent rate is too high and should conclude to put into effect a one and one half cent rate. Under the Constitution, it is required to put in one higher, or lower, than that mentioned in the notice and as to which there has been a hearing. As to the new rate thus to be established by the Supreme Court of Appeals, there is no provision for a hearing. There has been no hearing in respect to that rate before the Commission. There is an ex-

press provision in sub-section (*f*) of Section 156 of the Constitution, that no new or additional evidence shall be introduced in the appellate court. While there is a provision giving to the appellate court the power to remand to the Commission any case pending on appeal, and to require the same to be further investigated by the Commission and reported upon to the court, together with the evidence, that power is in respect to the case then pending, and to the issue made by the Commission, and is not applicable to a new case and a new rate not involved in the Commission's action. The language of the Constitution is that when the case is referred back, the court may "require the same to be further investigated." What has been investigated? That which is covered by the order of the Commission. It does not say that something else may be referred to it to be further investigated. It cannot reverse and then, in the order, refer the matter back for investigation as to another rate, but, "at the same time" reversal is made, the court is required to do the legislative thing of making a rate, under the penalty of its order reversing the Commission being wholly void—a provision which, in itself, necessarily shows that the new rate to be fixed by the court of appeals, which can be done only as a part of its reversal order, is not intended to be referred back for investigation, because the very order reversing the previous rate and making the reference for a new investigation would be itself void, unless the Court at the same time substitute therefor another rate.

It has been shown that we get no hearing as to this rate before the Commission, and that we get none before the Supreme Court of Appeals of Virginia. It is likewise impossible to get it before the Supreme Court of the United States. The function of the Supreme Court of the United States is to entertain appeals from judicial judgments or decrees, and not appeals from the legislative action of making a rate, whether that action be performed by a legislature, a commission, or a court. Section 709 of the Revised Statutes of the

United States provides, with respect to State tribunals, for an appeal to this Court only from

> "a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, etc."

It is not for a moment to be supposed that an appeal from this legislative act of rate making by the Supreme Court of Appeals will be entertained by the Supreme Court of the United States. This court has itself determined that even Congress cannot confer upon it any but judicial powers. In a posthumous note made by Chief Justice Tawney and published in 117 U. S. as an appendix, it is declared that Congress itself cannot require of the Supreme Court of the United States, or of any court of the United States, the performance of any but judicial functions. If Congress is not capable of doing this, it assuredly cannot be done by the action of any state. As the effect, therefore, of this Constitution, if the claim of the Appellants should be sustained, we would be in the position of not having any right to the protection of a federal court in respect to the rates complained of—not in the circuit courts, because they claim that they have abolished this well understood jurisdiction of the federal courts, and not in the Supreme Court of the United States, because the appeal would be from legislative, and not judicial, action, and hence not a matter of which the United States Supreme Court would take jurisdiction.

4. The anomaly is presented of permitting the Commission which is appealed from to prescribe such requirements as, "in its judgment," are sufficient in respect to the keeping of accounts, and, for a failure to keep such accounts, the Constitution permits the Commission to at once enforce the order appealed from, notwithstanding the pendency of the appeal and the supersedeas. It gives the Commission the like power of enforcing the order appealed from, notwith-

standing the pendency of the appeal, in the event the appealing company fails to give such additional suspending bond as "in the opinion of the Commission" may become necessary.

IX.

THE CONTENTION OF COUNSEL FOR THE APPELLANTS, INSISTED ON IN THEIR PLEADINGS, THAT THE ACT SOUGHT TO BE ENJOINED IS PART OF A LEGISLATIVE ACT, AND, HENCE, CANNOT BE ENJOINED BY A COURT, IS UNSOUND.

The prayer of each of the bills is that the defendants therein be enjoined from publishing the notice of their order under the provision of the Constitution about to be mentioned, and also "from taking any step or steps whatsoever under the Constitution or laws of Virginia to enforce the requirements of said order, or so as to hinder or prevent the complainants from exercising any of their legal rights in the premises." Of course, it will be conceded that steps to enforce the requirements of a final order are not part of the legislative act of making the rate, and the Appellees insist that the publishing of the notice of the order, as required by the Constitution, is a step to enforce the requirements of such final order, and therefore not a part of the legislative act. The provision of the Constitution referred to is as follows (Sec. 156, sub-section (*b*)):

> "Every such general order, rule, regulation or requirement, made by the commission" [which this order fixing the rate is admitted to be] "shall be published at length, for the time and in the manner above specified" [not less than once a week for four consecutive weeks in one or more newspapers of general circulation published in the City of Richmond, Virginia], "before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission."

It will be noted that the order fixing the rate complained of contains a final clause reading as follows:

> "It is ordered that the clerk of the Commission do forthwith publish this order in full in one of the newspapers of general circulation published in the City of Richmond, once a week for four successive weeks, as required by law."

The Commission published the order twice of the required four times when this injunction was awarded. The order of the Commission was a finality. It is so, not only by reason of its intrinsic character, but because it is expressly made a finality by the statute of Virginia, by section 34 of the act on this subject, providing for:

> "An appeal to the supreme court of appeals, same to be taken and perfected within six months from the date of such final finding, order, or judgment."

The right of appeal thus dates from the date of the order,—not from the date of the completion of publication. The Commission need not have published the order at all for the six months and still the parties affected would be entitled to an appeal, because it is a final order. It is a final announcement of the discretion of the legislative body which enacted it. Discretion was at an end. Enforcement was beginning. As was said by Justice McKenna in the case of Southern Pacific Railroad Co. *v.* Board of Railroad Commissioners, 78 Fed., 246:

> "It is the duty of the Commission not only to enact provisions for the regulation of rates, but to enforce them. Certainly when the former is done that is the enactment of the rate, and when the latter is threatened, the courts have power to review the regulation, and, to use Justice Brewer's words, 'condemn or sustain this act of quasi legislation.'"

The act of determining upon the rates was, in the case at bar, finished. The enforcement of the rates thus made was threatened. And, as Justice McKenna says, certainly under those conditions the courts have power to examine, and either

to destroy or to sustain, this act of quasi legislation. This act of publication is not legislative—it is ministerial; it is plainly required by the very terms of the Constitution; it is a mere ministerial obedience to its orders. The fact that the rate is not to have effect until the publication is completed does not prevent such publication from being a ministerial act in the sense that a court may reach it by its order. There are several cases which decide this to be the law.

In the case of State *ex Rel.* Morris *v.* Mason, Secretary of State, 43 La. Ann., 590, 9 Sou. 776, the situation was this: An attempt was made to amend the Constitution of the State of Louisiana in respect to lotteries. The mode of amendment required by the Constitution was that the proposition to amend should be adopted by a two-thirds majority of both houses of the General Assembly; that, after this was done, the proposed constitutional amendment should be published for a given length of time; and that, after such publication, there should be a vote of the people to determine whether or not the constitutional amendment should be adopted. The legislation was not complete until the final vote of the people. The legislation was begun by the proposal of the legislature. There lay between the two the ministerial act of publishing this proposition of amendment made by the legislature,—half way between, and linking them together,—an essential element in the legislation, a condition precedent to the power of the people to make the proposition completed legislation. The Secretary of State refused to make the publication, claiming that he had a discretion, but the court held it to be a mere ministerial act, and required him to publish the amendment proposed. Even in that case, in which the publication was a condition precedent to the perfecting of legislation which could not be completed until the people had voted, the court held that the act of publication was not legislative but was ministerial, and required the publication to be made.

It is unnecessary to refer to the fact that injunction will always be issued to restrain an act, if illegal, in any case in

which mandamus would lie to enforce it if required by law. This is established by the case of

Gaines *v.* Thompson, 7 Wall., 347.

See High on Injunctions, Sec. 135.

In the case of

Wolfe *v.* McCaull, 71 Va., 876,

the Code of Virginia made it the duty of the keeper of the rolls, McCaull, to have a bill which had become a law printed and published with the other acts of the General Assembly. The keeper of the rolls failed to perform this duty, and a mandamus was awarded by the Supreme Court of Appeals of that State to require him to print and publish the law in question.

In the case of

Wise *v.* Bigger, 79 Va., 269,

the keeper of the rolls sought to publish a law which was claimed by the Hon. John S. Wise to be no law, because contrary to the Constitution, and the Supreme Court of Appeals of Virginia entertained jurisdiction to inquire into that question, and held that if in its opinion the law were unconstitutional they would stop its publication; but, in the special case, arriving at the conclusion that the law was in fact constitutional, it on that ground alone refused to issue the writ.

In support of the proposition that legislation may become final in such sense as to be subjected to judicial review although publication remains to be made before such legislation becomes effective, see Reed *v.* Mayor, etc., of Woodcliff (N.J.), 60 Atl., 1128. This case came up on certiorari by Reed for the vacation of certain ordinances passed by the mayor and common council of the borough. The certiorari removed certain proceedings of the borough council of Woodcliff for laying out a new road. The borough was governed by the General Borough Act, one section of which provided that no ordinance should be finally passed except by a vote of a majority of the whole council. The ordinances in question were passed by

a vote of 3 to 2, one of the 6 members being absent. The objection made by the respondent's counsel to the vacation of the ordinances and the ruling of the court thereon are shown by the following quotation from the opinion of the court:

> "The respondent's counsel insists that, inasmuch as the ordinances have not yet taken effect, notwithstanding they have been passed, because they have not been published as required by the borough act that they shall be before they become operative, the prosecutors are not aggrieved, and hence should not be permitted to review these ordinances by this writ at this time. The publication, being a matter of course, and a duty cast upon the council, need not occur before proceedings may be taken. The action here reviewed is the action of the council, and, its action being void, it should be set aside.
>
> "The ordinances brought up are vacated, with costs."

In addition to the foregoing authorities in support of the proposition that the act of publishing an order of the State Corporation Commission prescribing the rates which shall go into effect is not a legislative, but a ministerial, act, and that such an act may be restrained by the courts in a proper case, the attention of the Court is respectfully called to several decisions of Circuit Courts of the United States in cases where this question has arisen, in which boards of railroad commissioners were restrained from publishing, in accordance with statutory mandate, the notice made by such statute a prerequisite to the taking effect of the schedule of rates determined upon.

In Chicago &c. Railway Co. *v.* Dey *et al.*, (C. C., S. D. Ia.) 35 Fed., 866, the defendants, railroad commissioners of the State of Iowa, had made a schedule of maximum rates for the transportation of freight within the State, and were proceeding to publish notice thereof, in accordance with a statutory requirement, which in legal effect is the exact equivalent of the provision of the Virginia Constitution in respect to

such publication, the statutory provision of Iowa being found in Section 17, Chap. 28, of the Laws of the 22d General Assembly of Iowa. The pertinent parts of this Iowa statute are as follows:

> "The Board of Railroad Commissioners of this State are hereby empowered and directed to make for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads; * * * When any schedule shall have been made or revised as aforesaid, it shall be the duty of said Commissioners to cause notice thereof to be published for two successive weeks in some public newspaper published in the city of Des Moines in this State, which notice shall state the date of the taking effect of said schedule, and the said schedule shall take effect at the time so stated in such notice and a printed copy of said revised schedule shall be conspicuously posted by each common carrier in each freight office or passenger depot upon its line or lines."

The legal effect of the Iowa statute, it will thus be seen, was, by reason of the requirement that the rates should take effect at the time stated in the published notice, to prevent the taking effect of such rates until the notice was duly published. The effect of the Virginia Constitution is exactly the same.

Before the required notice under this Iowa statute had been published continuously the requisite number of times, the railroad companies concerned filed a bill for a restraining order and injunction. The terms of the injunction sought appear from the statement of the case:

> "The prayer of the bill is that the Railroad Commissioners be enjoined and restrained from further publishing notice of said schedule, and also that they be enjoined from instituting or prosecuting any suits for penalties provided in said act, from entering complaint, or making orders thereon, and instituting or causing to be instituted any suits to enforce such

> orders having for their object the enforcement of said schedule, and asking for a temporary injunction restraining the defendants from continuing the publication of said notice, and from instituting and prosecuting suits during the pendency of this suit."

Upon presentation of the bill to Justice, then Judge, Brewer, a restraining order in the terms prayed was issued, and the case set for hearing. When the case came on, upon motion for a preliminary injunction, the court ordered the preliminary injunction to issue, in accordance with the terms of the restraining order.

In this case the point appears to have been made in behalf of the defendant railroad commissioners, that inasmuch as the commissioners had been directed by the statute to fix a schedule of rates, and to publish the notice in order to make such rates effective, the defendants, in causing such notice to be published, were performing, as agents of the General Assembly, an act necessary to the completion of the legislation, and therefore an act legislative in nature; and that an act of this nature was beyond the control of the court. This contention was overruled, and the injunction against the publication was granted.

The same situation was presented in the case of Northern Pacific Railway Company *et al. v.* Keyes *et al.*, (C. C., D. N. Dak.) 91 Fed., 47. In that case the board of railroad commissioners of North Dakota, proceeding under the provisions of Section 29 of Chapter 115 of the Laws of North Dakota of 1897, fixed a schedule of maximum rates, and were proceeding to publish notice of the same. The pertinent parts of the section in question, which is modeled upon the Iowa statute above quoted, are as follows:

> "The Board of Commissioners of Railroads of this State are hereby empowered and directed to make for each of the railroads, railroad corporations and common carriers subject to this act, doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers, freight, property and cars on each of

said railroads; * * * When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to forthwith serve a copy of said schedule upon such railroad, railroad corporation or common carrier affected thereby and a notice stating when such schedule shall go into effect and to cause notice thereof to be published for two successive weeks in one public newspaper published in each judicial district in this State, which notice shall state the fact that a new schedule has been made and the date of the taking effect of said schedule, and said schedule shall take effect at the time so stated in such notice and a printed copy of said revised schedule shall be conspicuously posted by such railroad, railroad corporation or common carrier in each freight, express or receiving office and passenger depot upon its line or lines."

Before the publication of the required notice the requisite number of times, several railroad companies filed bills against the board of railroad commissioners, its secretary, and the publishers of the newspapers in which the notice was being printed, alleging that the rates were confiscatory, and praying "that the further publication of the notice be restrained, and that the board be enjoined from putting the rates in force."

Upon preliminary hearing, a temporary injunction was granted, and thereafter the case came on for final hearing before Thayer, Circuit Judge, and Amidon, District Judge, and resulted in the entry of a final decree in accordance with the prayer of the bill.

That no distinction can be drawn between the act of publication which was enjoined in the two cases just cited and the act of publication by the State Corporation Commission of Virginia in this case, will clearly appear from the following comparison of the pertinent provisions of the enactments of Virginia, Iowa, and North Dakota, relative to the methods by which the commissioners in these States, respectively, should prescribe and establish railroad rates (the order of the provisions being changed to some extent so as to bring analogous provisions into juxtaposition):

Virginia.

Constitution of 1902, Section 156 (*b*).

The Commission * * * shall from time to time prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, * * * as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the Commission may, from time to time, alter or amend.

Section 17, Chapter 28, of Laws of Iowa, 22 General Assembly, 1888.

The Board of Railroad Commissioners of this state are hereby empowered and directed to make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads; and said power to make schedules shall include the power of classification of all such freights, and it shall be the duty of said Commissioners to make such classification; * * * Said Commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules.

Section 29, Chapter 115, of Laws of North Dakota, 1897.

The Board of Commissioners of Railroads of this state are hereby empowered and directed to make for each of the railroads, railroad corporations and common carriers, subject to this act, doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers, freight, property and cars on each of said railroads, and said power to make schedules shall include the power of classification of all such freights and property, and it shall be the duty of said Commissioners to make such classification. * * * Said Commissioners shall from time to time * * * change and revise said schedules.

before the Commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in

* * * before finally fixing and deciding what the original maximum rates and classifications shall be, it shall be the duty of the Railroad Commissioners to publish ten days notice in two daily papers published in Des Moines, setting forth in such notice

* * * before finally fixing and deciding what the original maximum rates and classification shall be, it shall be the duty of the Commissioners of railroads to publish ten days notice in two daily papers published in the state, setting forth in such notice that at a

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substance not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement;

and every such general order, rule, regulation or requirement, made by the Commission shall be published at length for the time and in the manner above specified, before it shall go into effect. * * *.

that at a certain time and place they will proceed to fix and determine such maximum rates and classification; and they shall at such time and place and as soon as practicable afford to any person, firm, corporation or common carrier who may desire it an opportunity to make an explanation or showing or to furnish information to said Commissioners on the subject of fixing such maximum rates and classification, * * *.

When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause notice thereof to be published for two successive weeks in some public newspaper published in the city of Des Moines in this state, which notice shall state the date of the taking effect of said schedule, and the said schedule shall take effect at the time so stated in such notice * * *.

certain time and place they will proceed to fix and determine such maximum rates and classifications; and they shall at such time and place, and as soon as practicable, afford to any person, firm, corporation, railroad, railroad corporation or common carrier who may desire it, an opportunity to make an explanation or showing, or to furnish information to said commissioners on the subject of determining and fixing such maximum rates, fares and classification; * * *.

When any schedule shall have been made or revised as aforesaid it shall be the duty of said commissioners to forthwith serve a copy of said schedule upon such railroad, railroad corporation or common carrier affected thereby and a notice stating when such schedule shall go into effect, and to cause notice thereof to be published in each judicial district in this state which notice shall state the fact that a new schedule has been made and the date of the taking effect of said schedule and said schedule shall take effect at the time so stated in such notice * * *

Under the provisions of each of these enactments it is made the duty of the commissioners to make or prescribe a schedule of rates; the respective commissions, after having made such rates, are required to publish them for a certain number of times and in a certain manner; such publication in the required manner must be accomplished as a prerequisite to the taking effect of the rates.

If the order of the Virginia Commission is not a finality in such sense that its publication may be enjoined, since such publication is necessary to its completion, then it is clear that the schedules of rates made in the Iowa and North Dakota cases were not such finalities, for not only is it required by the statutes of those states (above set out) that the notice which the respective commissioners are required to publish shall state the time when the rates shall become effective, but it is also provided in each of the sections referred to that, in order for the schedule made to be used as evidence in the courts, there must be a certificate of the railroad commissioners to the effect not only that the schedule produced is a true copy of the schedule prepared by them, but that "notice of making the same *has been published as required by law.*" There can be no doubt, therefore, that in order that the rates made should become the lawfully established rates, notice thereof had to be published in the manner prescribed by law; yet the Circuit Courts of the United States, in the cases referred to, without hesitation enjoined the publication of such notice.

In Minneapolis Street Railway Company *v.* City of Minneapolis, (C. C. D. Minn.) 155 Fed., 989, the street railway company sought an injunction against the publication of an ordinance reducing the rates on the line of such street railway company, on the ground that the effect of such ordinance was to impair the obligation of the contract between the city and the street railway company created by a prior ordinance of such city. The question of jurisdiction raised by the complainant and the ruling of the court with regard

thereto, appear from the following quotation from the opinion of the court (p. 992):

> "It seems to me to be completed. It has gone through all the steps which the council would take in the passage and enactment of an ordinance. Of course, it is not necessary that I should attempt to rehearse what those would be from the introduction of the proposed ordinance in the body by some of its members, passing through the different readings and references to committees and reports and amendments, and everything of that kind, until its final passage on a vote of yeas and nays; but it appears to me, in fact, that this ordinance has passed through all those steps, and that it is an ordinance passed by the council, transmitted to the mayor, and which has received his signature, he having the right, and it being his duty, to sign it if he approves of it, and if he does not approve of it to return it to the council that passed it with his objections, when there would remain legislative action to be taken: that is, the vote by which it was passed would be reconsidered and the objections made by the mayor would receive consideration from the council, and they could act upon it as to them seemed right and proper, with the right, of course, to reject the ordinance at that stage, or, if they deemed it should be passed, to pass it over the veto of the mayor, if it received the requisite number of votes for that purpose. It had passed through that stage. There was nothing further in the way of performance of any legislative function, it seems to me, to be done in respect to that ordinance. It is a completed ordinance. If it is constitutional, it is then a valid ordinance, although the operation of it is suspended until the publication, which would give notice to every person of the fact that such an ordinance was passed and is in existence. It seems to me this does not differ at all from what would be the case if an ordinance was passed, as acts of the Legislature are frequently passed, to take effect at a subsequent time. They are complete as far as legislative action can go at the time of the passage. There is no legislative action to be taken between that time

and the time they go into effect; and there is no legislative action in this case, it seems to me, between the time when this ordinance was signed and approved by the mayor, the last legislative action in connection with it, and the time when it shall be, if it ever happens, published. That is merely a ministerial act, the publication of it, which I think, according to the provisions of the city charter, and the general law in relation to villages and cities, would devolve upon the clerk perhaps to pass the proper copy of it to the printer, and the printer to print it. The action of the clerk would not be legislative. The action of the printer would not. It would not be legislative at all, and it is not interfering, therefore, with the legislative functions to grant an injunction at the present time and to enjoin the publication of it, because that is an act which puts it in force and puts the complainant in danger of it, which would be liable to bring upon the complainant the strenuous demands of persons who would become passengers upon the street cars for conformity with the ordinance, and liable to bring about disturbance if those demands were not complied with, and liable to bring, also, some kind of suits on the part of the city for the purpose of compelling the complainant to comply with it. And therefore I hold that this suit is not prematurely brought, and that it is proper to restrain the publication of the ordinance, it having passed the legislative state."

Accordingly, the court, finding that the ordinance in question was invalid, issued the injunction as prayed for in the complaint.

A pertinent case in this connection is that of Southern Pacific Company *v.* Board of Railroad Commissioners (C. C. N. D. Cal.), 78 Fed., 236, opinion by Justice, then Judge, McKenna. In that case the railroad company filed a bill praying for an injunction against the Board of Railroad Commissioners of California, to restrain them from putting into effect the rates adopted by the Board in the following resolution (dated September 12, 1895):

> "Resolved, that the rates at present existing for the transportation of grain in California by the Southern Pacific Company, and its leased lines, as established by grain tariff No. 2 and all subsequent amendments thereto, be, and the same are hereby, reduced 8 per cent.; and the secretary of this board is hereby directed forthwith to prepare for publication by this board a schedule of rates in accordance herewith: and, when so prepared, the same shall be published at once, and take effect as soon thereafter as allowed by law, and that on the adoption of the revised general freight tariff of said company, herein provided for, any further per cent. deduction due said grain tariff, as provided herein, shall be given."

The Constitution of California, Article 12, Section 22, provided that it should be the duty of the Railroad Commissioners

> "to establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such changes as they may make."

The legislature of California passed a law in accordance with the above constitutional provision, in Section 11 of which it was provided (Act of April 15, 1880):

> "Whenever said board, in the discharge of its duties, shall establish or adopt rates of charges, * * * pursuant to the provisions of the constitution, said board shall serve a printed schedule of such rates * * * upon the * * * corporation affected thereby, and upon such service it shall be the duty of such * * * corporation to immediately cause copies of the same to be posted in all its offices, * * * affected by such rates. * * *. Said board shall also make such further publication thereof as they shall deem proper or necessary for the public good. * * * The rates of charges established or adopted by said board, pursuant to the constitution and this act, shall go into force and effect on the twentieth day after service of said schedule."

The Court granted the application for a restraining order requiring the defendants to appear and show cause why an injunction *pendente lite* should not be granted, and meanwhile restraining the defendants "from in any manner adopting, publishing, promulgating or putting, or attempting to put, in force any schedule or schedules of rates of charges for the transportation of freights in California by the said complainant the Southern Pacific Company, or its leased lines, by which any of said freight rates are reduced or attempted or purport to be reduced below such rates as were in force and effect upon the 12th day of September, 1895," etc.

When the case came on for hearing upon the question of the issuance of a preliminary injunction, counsel for the defendants insisted that the Court was without jurisdiction to grant the injunction sought because the acts sought to be restrained were legislative and hence beyond the control of the Court. When the bill was filed the grain schedule had been served, but the twenty days required by the statute before the rates should become effective had not elapsed. The contention of counsel for the defendants was overruled, and an injunction granted continuing the restraining order, the Court holding that the publication of the rates was a part of the *enforcement* of the resolution, and that it had jurisdiction to restrain the enforcement of confiscatory rates. This case was quoted with approval by this Court in McChord *v.* Louisville & Nashville Railroad Co., 183 U. S., 483, 497, where it was said:

> "In Southern Pac. Co. *v.* California Railroad Comrs., 78 Fed. 236, the law of California provided that the commissioners might 'enforce their decisions, and correct abuses through the medium of the courts;' and, in substance, that after the rate was made by the commission, a copy of the order should be served on the corporation affected thereby, and that twenty days thereafter the rate should take effect. A bill was filed before the twenty days had expired; and Mr.

> Justice McKenna, then Circuit Judge, held that it was the duty of the commissioners to enforce the rate, and that an injunction would lie. The railroad commission had made an order reducing the grain rates of the company 8 per cent., and had passed a resolution declaring that its general charges were 25 per cent. too high, and that 'this board proceed at once to adopt a revised schedule of rates in accordance herewith, in order that the same may be in force before January 1, 1896.' The court enjoined the enforcement of the 8 per cent. reduction, which had already been made, but declined to restrain the 25 per cent. reduction, because no decisive action had been taken."

The principle settled by the authorities is that a legislative act, in process of adoption, does not amount to an invasion of property rights, even though unconstitutional, while any ministerial or administrative effort to enforce such act, after adoption, by whomsoever it may be made and no matter what may be his official position, does amount to an invasion of property rights, and is subject, in a proper case, to be enjoined.

In Marbury *v.* Madison, 1 Cranch, 137, it is said:

> "It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

It is not the legislative office, any more than it is the executive office that is protected; it is the nature of the thing to be done that determines whether or not the court has jurisdiction to stop it.

The act now being considered is a ministerial act of publishing an order of the Commission. In the case of Mississippi *v.* Johnson, 4 Wall., 475, 498, it is said:

> "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to

> which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."

This is a definition of a ministerial act which can be compelled by mandamus, but the right to an injunction to prevent the enforcement of an unconstitutional act is even broader, for as was said in *Ex parte* Young, 209 U. S., at page 159:

> "The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the State officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer."

In the case at bar, an order had already been made by the Virginia Commission, but there was a provision in this order requiring its publication. The Constitution of Virginia expressly requires that an order under these circumstances must be published. It was a simple, definite duty arising under a condition admitted, or rather, declared by the Commission, to exist and imposed by law. We respectfully submit that it is only the *discretion* of the legislative body which is beyond the reach of the process of the court. There are a great number of authorities establishing this proposition. In the case of Alpers *v.* San Francisco, 32 Fed., 503, Mr. Justice Field, of the Supreme Court, says this:

> "The same exemption from judicial interference applies to all legislative bodies so far as their legislative discretion extends. * * * The courts cannot, in the one case, forbid the passage of a law, nor in the other the passage of a resolution, order or ordinance. If

by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. *It is legislative discretion* which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

And in the Supreme Court of the United States in the New Orleans Water Works Co. *v.* New Orleans, 164 U. S., 481, it is said:

> "But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin. * * * *If an ordinance be passed* and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement."

And further on in the same case, Justice Harlan, delivering the opinion of the Court, says at page 482:

> "We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be pre-

> vented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them."

It will be recalled that the prayer of the bills in this case is not only that the publication may be enjoined, but the further prayer that the Commission may be enjoined "from taking any other step or steps whatever under the Constitution or laws of Virginia to enforce the requirements of said order," etc.

But the Appellants claim that when they come to enforcing the order made by themselves, the only thing they can do to enforce it is to be done before themselves as a court, and that the Federal Courts can not enjoin a state court, because of Section 720 of the Revised Statutes.

They thus try, by the device of claiming to be a court, to shut up every avenue of access to the Federal Circuit courts which is given by the Constitution of the United States and the laws passed in pursuance of it. Let us see whether they can succeed. As above shown, the nature of the act which was enjoined in this case by the court below is the same as was enjoined in the Reagan case, where the following is an extract from the injunction. In that case the Commission was enjoined from instituting or authorizing or directing any suits for penalties and from certifying any copy or copies of any of said orders, tariffs or circulars, or from delivering, or causing, or permitting to be delivered, certified copies of any of said orders, tariffs or circulars, to the attorney general or any one else, or from furnishing the attorney general or any other party any information of any character for the purpose of inducing, enabling, or aiding him or any other party to institute or to prosecute any suit against the defendant for the recovery of penalties, and from making, issuing, or delivering to the railroad company, or causing to be made, issued or delivered to it, any such tariff or tariffs, circulars or orders.

In the court below, the Appellees asked, and the court granted, an injunction practically in the terms of the Reagan injunction approved by the Supreme Court of the United States. We asked an injunction against these parties from enforcing their order, which is shown by the facts admitted by the pleadings to have the effect of impairing our constitutional rights. We asked that they should be prevented from enforcing in a court (as they say) this order, as was done in the Reagan case and also in the Smyth *v.* Ames case, for, in the latter case, the board of transportation was enjoined from entertaining, hearing or determining any complaint to it against any railroad company, or from instituting a proceeding, or prosecuting, or causing to be instituted or prosecuted, any action or proceeding. So that the nature of the act enjoined in this case in the court below is the same that was enjoined with the approval of the Supreme Court of the United States in the Reagan case, in the Smyth *v.* Ames case, and in many other cases. The Appellants, however, attempt to differentiate the two classes of cases as follows: They say that, in the Reagan case and in the Smyth case and in the other cases on the same lines, it was necessary for the parties enjoined to go into another court to enforce the requirement, while in the cases at bar the parties enjoined have a right to enforce their order before themselves, and that when they are enjoined from going into their own court an injunction is awarded in effect against the court itself. Let us examine this claim. In the Reagan case from Texas and in the Smyth case from Nebraska, as well as in the other cases in line with them, there was a more liberal provision for the protection of the constitutional rights of persons injured than there is in Virginia, for in those cases, when the rates had been enacted and published it was required that the commission should go into an independent and impartial tribunal to enforce them. In those cases there was at least provided a judicial hearing before an impartial

judicial body. In the cases at bar, however, we have a case where an attempt is made to cut us off from this judicial hearing before an impartial judicial body, and the Appellants claim that the effect of this effort to cut us off from an impartial hearing before an impartial judicial body—the very illiberality of the system, the very excess of danger that arises from the fact that the same body that enacted the rates is authorized to pass upon them judicially, the greater danger to our constitutional rights which is created by having the same body decide upon the legality of the rate which it itself has established—is to give us less protection in the courts instead of more. It must be admitted that we need this protection worse under the Virginia system than it was needed under the Texas or the Nebraska system, where the merits of the controversy were to be passed upon by an independent and impartial judiciary. Can that claim be well founded when a court looks at the substance and not at the form? As was said by this Court in the case of Chicago, Burlington & Quincy Railroad Co. *v.* Chicago, 166 U. S., 235, in discussing what is due process of law:

> "So, in determining what is due process of law regard must be had to the substance and not to the form."

But let us analyze how this body in Virginia must proceed. In the Texas case and in the Nebraska case, the commissions were compelled to institute the proceedings before an impartial court. What elements did the act of proceeding to enforce rates embrace? It embraced in both those cases the element of proceeding to inaugurate a proceeding before some court, and the other element of the court's passing upon the proceedings thus instituted. Is either one of these elements lacking under the Virginia system? The Commission in Virginia must proceed before some court to enforce its rate, and the court must pass upon the legality of it. Does the fact that the Commission that proceeds is

the same as the Commission that hears and determines, destroy either one of the elements or abolish either one of the steps in the enforcement of the rate? The act of inaugurating the proceeding in Virginia must be done by the Commission. The act of determining the justice and reasonableness of the Commission's own action must, in Virginia, be done by the Commission. Under the Texas and under the Nebraska statute the act of instituting the proceeding must be done by the commission; the act of hearing and determining must be done by a separate court. When, therefore, we analyze what is to be done, the step of inaugurating the proceeding which will invite the action of the court is present in both methods of procedure; that under the Virginia system as well as that under the Texas and Nebraska systems. In the Texas case and in the Nebraska case the act of inaugurating the proceeding was enjoined with the sanction of the Supreme Court of the United States. Can it be any answer to our contention that the Virginia Commissioners may be enjoined from proceeding with this initial step to say that the Commission must proceed before itself? Of course the injunction must be an injunction against the inauguration of the proceeding. We need no more enjoin the Virginia Commission from hearing than the courts of Nebraska or the courts of Texas were enjoined from hearing, but surely it c. n not be a sound constitutional principle that the very imminence and greatness of the danger that the State constitutional system creates shall be used as a means of further destruction, by limiting the power vested by the Constitution and laws of the United States in the Federal courts to protect our constitutional rights.

X.

THE VIRGINIA SYSTEM DEPRIVES APPELLEES OF THE EQUAL PROTECTION OF THE LAWS, IN THAT IT DENIES TRANSPORTATION COMPANIES ACCESS TO COURTS OF EQUITY, DECLARED BY THE SUPREME COURT OF THE UNITED STATES TO BE THE PROPER, IF NOT THE ONLY, MODE OF JUDICIAL RELIEF, AND ALL DEFENSE AGAINST A MULTIPLICITY OF SUITS, WHILE ALL OTHER INTERESTS IN THE STATE OF VIRGINIA ARE GIVEN SUCH REMEDY IN EQUITY AND SUCH DEFENSE.

It will be borne in mind that it is provided in sub-section (*d*) of Section 156 of the Virginia Constitution that:

> "No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the Commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties."

When the right of any other person in Virginia, protected by the Constitution of the United States, is about to be invaded, the action may, in a proper case, be enjoined in a court of equity and a multiplicity of actions may be thus prevented. This is a substantial right. It is necessary to justice. And there can be no classification of justice. No classification can subject one interest to destruction and provide remedies for the protection of other interests. There are certain fundamental rights of which no classification can deprive a person, and the right to a substantial remedy for wrong and for deprivation of property is a substantial and fundamental right. To subject one interest to the unconstitutional operation of a State tribunal, with no remedy for its protection, and to give to every other interest in the State

a right to protection against unconstitutional invasion of its rights, thus leaving in the one case property to be taken through the device of multiplicity of actions, and in the other instance protecting property from being thus taken, is unquestionably a denial of the equal protection of the laws, and any system which attempts it is unconstitutional under the Fourteenth Amendment.

Nor is this vice removed by the appeal from the Commission's action, allowed by the constitution of Virginia to the Supreme Court of Appeals of that State, and the supersedeas which may be awarded on such appeal? It has been heretofore shown in this brief that the effect of such appeal and supersedeas is not that which is ordinarily given to appeals and supersedeas under the Virginia system, namely, that of absolutely suspending the judgment and preventing the institution of actions upon it, but the Constitution of Virginia is express in sub-section (*h*) of Section 156 in its provision that, after the Commission takes the action complained of, pending an appeal, and notwithstanding a supersedeas, the right of any person to institute and prosecute any actions against the appealing company is not extinguished or impaired, and these actions may proceed to a valid judgment, unless the defendant appears and makes defense thereto of the pendency of such appeal and supersedeas, in which event the action is not destroyed, but merely can not be heard and disposed of pending the appeal. The defendant company is thus left to be *vexed* by this multiplicity of actions under the Virginia system, notwithstanding the appeal which it provides for, and thus is deprived of a substantial right which is enjoyed by all other litigants in the State, and thus, in substance and effect, is deprived of the equal protection of the laws.

Second.

The Commission of Virginia, because the Constitution of the State undertakes to confer upon, and unite in, it, the whole power of the State, legislative, executive and judicial, in respect to the rates in controversy, is, by the law of its creation, made a partial tribunal, and hence its judgments can not satisfy the requirements of due process of law. The law creating this union of powers, not being separable in its several provisions conferring these unconstitutional and inconsistent functions, is itself unconstitutional and void under the fourteenth amendment, in so far as it confers the powers referred to.

Heretofore, the argument contained in this brief has proceeded upon the concession, made for the sake of the argument, that the provisions of the Virginia Constitution creating the Commission were a valid exercise of state power; that even if that institution can stand as being in accordance with the fundamental principles of our government, it must be that, in taking some step, necessary to confiscation under legal forms, it is subject to constitutional control by the federal courts for the purpose of preserving to the immense interests involved their liberties and rights. In other words, even if the Commission of Virginia is the creature of a valid exercise of state power, it is not beyond the reach of our federal courts. As heretofore argued, the State of Virginia has no power, by any scheme of legislation, to establish a body capable of overriding the Constitution of the United States, and without being subject to the judicial power of the Union conferred by Congress, as authorized by the Federal Constitution, on the federal circuit courts; when such a body is clothed with every power of confiscation from the beginning

and inauguration of the policy, down through the successive steps of investigation, inquisition, legislation, executive enforcement, and judicial action, with the consequence of confiscation and destruction of constitutional rights at its end, it can not be possible that nowhere along that pathway lies a point where it can be stayed in its efforts to destroy the constitutional rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. Thus far, as we have said, the argument has proceeded on the argumentative concession of the validity of the Commission itself.

Now, however, we desire to ask the attention of the Court to the question whether or not the Commission of Virginia is a constitutional body; whether or not it is so constituted that it is a valid expression of a competent sovereign will; or whether, rather, the sovereign will of the people, as crystallized into its constitutional system and expressed in the Fourteenth Amendment to the Constitution of the United States, is that this provision of the Virginia Constitution is not law, and that the Commission we are now analyzing is not a valid and legitimate expression of popular will and purpose.

I.

WE RESPECTFULLY INSIST THAT THE LAW CREATING THE COMMISSION IS UNCONSTITUTIONAL, AND THAT THE COMMISSION ITSELF CAN HAVE NO VALID EXISTENCE.

As was said by the Supreme Court of the United States in the case of Norton *v.* Shelby, 118 U. S., 425:

> "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is in legal contemplation as inoperative as though it had never been passed."

And, as was said by Justice Brewer in the case of Railway Co. *v.* Dey, 35 Fed., 866:

> "The defendants claim that they are simply attempting to carry into effect the mandates of the state as expressed in one of its laws; but if that law be unconstitutional it is no law, and they have no authority for their action."

Let us analyze the inherent characteristics of this Corporation Commission of Virginia. By section 155 of the Constitution it is provided:

> "A permanent Commission, to consist of three members, is hereby created, which shall be known as the State Corporation Commission."

By section 156 (*a*) it is provided:

> "Subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which * * * shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State."

It is thus made the department of government possessing the whole power of Virginia in respect to the creation, visitation, supervision, regulation and control of corporations created by, or doing business in, the State of Virginia. It is no repository of an insignificant part of the body of law on this subject; it is the repository of the whole power of the State. By sub-section (*b*) it is provided that the Commission

> "shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the Commission shall,

> from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classification of traffic and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend."

This provision gives, more in detail, the Commission the whole body of power of the State in respect to these matters, subject to no superior authority, in respect to rates, subject to the general legislative power of the State in respect to other rules and regulations; but clothed, in the absence of any such legislative action, with the supreme power in respect to all these matters. In this same sub-section it is further provided:

> "The Commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this state, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the state, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company."

Thus, we have the duty of visitation, the duty of inspection, the duty of inquisition, the duty of detection. No wonder, in view of the powers to which allusion has been made, when the Honorable Chairman of that Commission

appeared before the committee of the Congress of the United States which was considering the Hepburn Bill and was telling that committee of the immense powers of this Virginia Commission, and how it exercised all executive, administrative, legislative, and judicial powers, that the Chairman of the Congressional Committee said "and inquisitorial." After the Commission has, in pursuance of the powers and duties created by the Constitution of Virginia, informed itself as to all the matters in respect to which it is given the powers of investigation—after it has detected, has visited, has inquisited, has formulated a policy—what is it required to do? It is then required, after having settled its policy in its political capacity, and in the political atmosphere which surrounds it, to formulate its *contemplated action*, the Constitution providing that before the Commission shall adopt any rule or regulation it shall first give "notice of the time and place when and where the *contemplated action*"—not an investigation, but action already formulated and in contemplation—"will be considered and disposed of." This is not made dependent upon the complaint of a party who feels himself aggrieved. The Commission does not sit as a court with its machinery of justice ever ready, but never in motion until it shall be started on complaint by a person who is injured; does not sit, as the Interstate Commerce Commission, powerless to fix a rate or to adopt a rule until a complaint is made before it; does not require a complainant to be present to present the merits of his own case, and the defendant to be present to defend itself in respect to such complaint thus made by a third party; but the Commission is required, by the law of its creation, to formulate its policy before it goes before itself to consider what has already been done by it—in other words, it is required to determine, first, on what should be the political policy of the State, and then, at its own instance, and of its own initiative, give notice to the railroad company to come up and answer before the body already predisposed in favor of a political policy which it

contemplates and the thought in respect to which it has already inaugurated and initiated—after it has become the patron of the policy of reducing the rate, of making the regulation, or of taking the other contemplated action.

The Appellants, however, say that the Commonwealth is complaining. It is true that the Commonwealth is required to be made a party by the terms, not of the Constitution, but of the statute passed in pursuance of the Constitution. But this is the form—the disguise—and this Court has said:

> "In determining what is due process of law regard must be had to the substance and not to the form." Chicago Ry. Co. *v.* Chicago, 166 U. S., 235.

This is, however, a matter in which the Commonwealth has no interest, and in which it is a formal, but not a necessary, or an interested, party.

> Missouri R. R. Co. *v.* Missouri R. R. Commission, 183 U. S., 53.
> *Ex parte* Nebraska, 209 U. S., 436.

But, in addition to the consideration that the Commonwealth has really no interest in the matter, it must be borne in mind that it has not through some agency other than the Commission, or some other department, inaugurated the policy—the Governor has never been consulted about it, the Attorney General has never been consulted about it. It is the thought, the offspring, the creation of the Commission itself, no matter whether the Commonwealth is a formal party or not. When we come to a hearing before the Commission we find an illustration of this. For the very order under consideration begins:

> "Commonwealth of Virginia, at the relation of the State Corporation Commission."

The Commission acts at the initiative of the State Corporation Commission,—at its own instance,—and is the real party complainant, and the defendants are summoned before the

Commission to determine the justice and reasonableness of its own thought, of its own conception, of its own product and policy. The Commission has first gone into the defendant's affairs as a visitor, with powers of visitation. It has exercised the powers of inquisition, it has exercised the powers of investigation, and having from all these evolved a policy, the solemn pretense is gone through with of going on the bench and sitting there while the defendants bring before it objections to a policy for which the Commission already stands sponsor. And, in addition to the powers mentioned, the Commission is the prosecutor. It inaugurates, it legislates, it prosecutes, it determines. After it has gone through a hearing in respect to its *contemplated action*, what does it do? It legislates. What next? If the defendant does not obey this order, the Commission hales the alleged offender before it, being careful, under the terms of the Constitution, to do this, professedly, by due process of law. It thus summons us before the same body to determine the justness and the reasonableness of the policy which the Commission has inaugurated, of the policy it has become committed to, of the policy in respect to which it has exercised its inquisitorial and detective functions, of the policy in respect to which it has become prosecutor, which it has already approved and enacted in its legislative capacity, and solemnly says to us: "Now, we will determine, upon hearing, whether we are right or you are right." The State might as well give the Commonwealth's Attorney power to investigate a case and to inaugurate a prosecution, and then put him on the bench and ask him to determine judicially whether he is right or the accused is right.

But the Appellants say that such a body as the Commission of Virginia has been upheld by this Court, and they cite the case of Dreyer *v.* Illinois, 187 U. S., 71, as sustaining them. In that case, an Illinois statute established a Board of Pardons and provided for indeterminate sentences, to be pronounced by courts, but to be thereafter given definite

limitation by the Board of Pardons, which Board was also given authority as follows:

> "Whenever it shall be made to appear to the state board of pardons from the warden's report, or from other sources, that any prisoner has faithfully served the term of his parole, and the board shall be of the opinion that such prisoner can safely be trusted to be at liberty, and that his final release will not be incompatible with the welfare of society, the state board of pardons shall have the power to cause to be entered of record in its office an order discharging such prisoner for, or on account of, his conviction, which said order, when approved by the governor, shall operate as a complete discharge of such prisoner, in the nature of a release or commutation of his sentence."

It was claimed, upon this state of the law, that the Board of Pardons in giving definite limitation to a sentence pronounced by the courts was exercising a judicial power, and, in entering an order, to be approved by the governor, for the discharge of the prisoner before his sentence was completely served, was exercising an executive power. It will be noted, however, that the Constitution of the state required (and this statute was intended to be in conformity with the Constitution of the State) that the pardoning power should rest with the executive, and, therefore, any action of the State Board of Pardons was made subject to the final approval of the executive. In this case of slight infringement of one department upon the other, this Court said, at page 84:

> "Whether the legislative, executive and judicial powers of a state shall be kept *altogether* distinct and separate, or whether persons or collections of persons belonging to one department may, *in respect to some matters*, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state." (Italics ours.)

But the Court proceeded to quote with approval the following language of Story. It said:

> "When we speak," said Story, "of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. (Story, Const., 5th Ed., 393.)"

It can not be successfully contended that this means that all the legislative powers in respect to every interest in the State, and all the judicial powers in respect to every interest in the State, and all the executive powers in respect to every interest in the State, must be combined before it is contrary to the principle. For what difference does it make, when one interest is subjected to that combination of powers in respect to all its interests, that some other interest, or every other interest in the State, has an impartial judicial tribunal for the ascertainment of its rights? If the exercise of the whole power of the State would, in respect to any interest, "subvert the principles of a free constitution," how are the tyranny and injustice that are thereby visited upon it, answered by finding that no other interest in the State is thus treated with tyranny and injustice? What comfort is it to us who must be visited and inquired into and prosecuted and legislated about and judged by one tribunal in respect to all matters involving our earning capacity, the use of our property, and, generally, our relations with the public, to know that somewhere else in the State of Virginia there is an impartial tribunal which can hear and determine similar prop-

erty rights of other interests? How is the question whether or not this is due process of law as to us, when the whole power of the State, legislative, executive and judicial, in respect to us, is thus confided to a single, and thereby to a partial tribunal, affected by the fact that somewhere else there is an impartial tribunal before whom somebody else may go for justice in his matters? The meaning of the principle announced by Justice Story, and the meaning of this Court when it endorses it, is that when the whole body of legislative power, or a substantial part of it, of executive power, and of judicial power, in respect to any one interest, is reposed in the same body, that body is by the law of its creation incapable of impartial justice, and therefore does not satisfy the requirements of due process of law. As was said by Chancellor Kent with respect to legislative and judicial powers in the case of Dash *v.* Van Kleeck, 7 Johns, 447:

> "It is a well settled axiom that the union of these two powers is tyranny. Theorists and practical statesmen concur in this opinion."

And as was said by the court in the Kansas Court of Visitation case, 98 Fed., 352:

> "A division of powers in a general view is what is meant, as is pointed out by Mr. Justice Story. The departments are politically connected, and to some extent they are interdependent, but their functions, being essentially different, are not blended, nor do they occupy a common ground, or exercise concurrent jurisdiction over the same subject-matter."

The underlying principle requiring the substantial separation of the three great departments of government is that it is necessary in the interests of justice that each of these departments should have a reasonable check upon it, so that there may be established that system of checks and balances which will prevent the exercise of absolute power. Absolute power over any subject-matter is capacity for tyranny.

What we contend for is this: That we are entitled to an impartial judicial tribunal for the ascertainment of our rights, to a tribunal which is not made partial by the law of its creation, and that unless we are given an impartial tribunal we do not have due process of law. But the Appellants say that all railroad companies in Virginia are shut up to this system of the Constitution and that this is a proper classification. We claim that there is no such thing as classifying justice. What we complain of as not being provided by this constitutional system is an impartial tribunal; a tribunal capable, by the law of its creation, of justice—a tribunal not prejudiced by its own action in advance, and its own interest in the matter of sustaining its own policies—and we deny that there is such a thing as classifying the various interests in the state and giving to one an impartial tribunal, and giving to another a partial tribunal. It is as bad as giving to one interest a judicial hearing and judicial protection and denying it altogether to another. No proper theory of classification can justify one any more than the other. We insist that it is no proper principle of classification when a tribunal, tainted by its own prejudices and its previous commitment against the party affected, is given to one, and a tribunal untainted by any previous relationship with the matter is given to another and that the person who has a partial tribunal does not receive the equal protection of the laws.

The principles on which we rely are well established by the authorities.

In the Norwalk Street Railway Company's Appeal, 69 Conn., 576, it is said:

> "One controlling consideration in deciding whether a particular act oversteps the limits of judicial power is the necessary inconsistency of such acts with the independence of the judicial department, and the preservation of its sphere of action, distinct from that of the legislative and executive departments. The main purpose of the division of powers between legis-

lature and judicature is to prevent the same magistracy from exercising in respect to the *same subject* the functions of judge and legislator. The union of functions is a menace to civil liberty and is forbidden by the Constitution."

And as pertaining to the general inquiry, the following further quotation is made:

"This distinction is illustrated in the decisions of the United States Supreme Court dealing with legislative regulation of charges by railroad companies. The regulation of such charges is held to be distinctly a legislative function, which may be delegated by the legislature to a subordinate legislative or administrative body; but if this subordinate body or the legislature exceeds its powers, and a person is thereby injured in his rights of property, he may invoke the judicial power to determine that question of legal injury; and the reasonableness of the charges, although a question legislative in its nature, must be reviewed by the court, as necessarily incident to the exercise of its judicial power. But, if the court should attempt to establish for the future a schedule of charges it would exceed the limits of judicial power; it would act as legislator in respect to a matter as to which it must also act as judge."

Dr. Paley, in his "Moral Philosophy," says:

"The first maxim of a free state is that the laws be made by one set of men and administered by another. In other words, that the legislative and judicial characters be kept separate."

And Montesquieu in his "Spirit of Laws," Book II, c. 6:

"When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty of the judiciary power if it be not separated from the legis-

> lative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of nobles or of the people, to exercise these three powers—that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

We also refer to the following cases:

> Pennoyer *v.* Neff, 95 U. S., 733.
> *Ex parte* Wall., 107 U. S., 289.
> Murray's Lessees *v.* Hoboken Land Co., 18 How., 276.
> Burns *v.* Multonomah R. Co., 15 Fed., 183.
> Justice Field in Railroad Tax Cases, 13 Fed., 752.
> Davidson *v.* New Orleans, 96 U. S., 97, 102.
> Weimer *v.* Bunberry, 30 Mich., 201.

From these authorities we deduce the principle that an impartial tribunal is necessary to due process of law. Certain elements that are necessary to due process of law are admirably expressed by the Supreme Court of Appeals of Virginia where it says:

> "'Due process of law' requires that a person shall have reasonable notice and reasonable opportunity to be heard before an *impartial tribunal*, before any binding decree can be passed, affecting his rights, liberty or property." (Italics ours.)
>
> Violett *v.* Alexandria, 92 Va., 567.

That there must be an impartial tribunal in order to satisfy the requirements of due process of law is further decided in the case of Meyers *v.* Shields, 61 Fed., 725, where it is said:

> "Even in a civil suit our system of judicial proceedings assures to each party a fair and disinterested judge and jury to pass upon the law and facts in controversy between them."

And in 8 Cyc., page 1084, it is said:

> "The term 'due process of law,' when applied to judicial proceedings, means that there must be a competent tribunal to pass on the subject matter. * * * And there must be a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights."

The question, therefore, is whether the Virginia Commission is by the law of its creation made an impartial tribunal. What constitutes an impartial tribunal has been decided by the courts from many points of view. In Dr. Bonham's Case, 8 Coke, 118, an act of Parliament had provided that there should be a body known as the Censors of the College of Physicians, who should prescribe the requirements for practice, and impose penalties for disobedience to those requirements. Lord Coke said:

> "The censors cannot be judges, ministers and parties; judges to give sentence or judgment, ministers to make summons, and parties, to have a moiety of the forfeiture."

The interest of the parties in this case was to receive a moiety of the forfeiture, but we are discussing this principle on a broader basis than that. We are insisting that due process of law requires that there should be an impartial tribunal. If partiality is established by pecuniary interest it makes the judgment partial, but we assume that no one will contend for the proposition that, if there is any other cause, not pecuniary in its nature, which makes the court partial, it is due process of law to any greater extent than it would be if the judge had a pecuniary interest.

In the case of London *v.* Wood, 12 Mod., 687, there was an action brought in the Mayor's Court of London against the defendant, Wood, to enforce forfeiture for failure to properly discharge his duties as sheriff. Chief Justice Holt, after discussing several points in the case, said:

> "But the true great point is that the court is held before the Mayor and Aldermen and that the action is brought in the name of the Mayor and Commonalty; and that very man who is head of the state, and without whom the state has no capacity to sue, is the very person before whom the action is brought; and this cannot be."

even under the laws of England.

And we quote from the case of Meyers *v.* Shields, 61 Fed., 725:

> "The object of all legislation pertaining to judicial or *quasi* judicial proceedings is to furnish an impartial and wholly disinterested tribunal, before which such proceedings are instituted and carried forward. It is to carry out the constitutional guaranty that no man shall be deprived of life, liberty or property without due process of law, that the chief safeguard of a disinterested judge, jury, referee or arbitrator is so carefully provided by legislation and protected by judicial scrutiny."

Lord Mansfield says, in Hesketh *v.* Braddock, 3 Burr., 1856:

> "The law has so watchful an eye to the pure and unbiased administration of justice that it will never trust the passions of mankind in the decisions of any matter of right. * * * There is no principle in the law more settled than this, that any degree, even the smallest degree, of interest in the question depending, is a decisive objection to a witness, and much more so to a juror, or to the officer by whom the juror is returned."

And the court in Meyer *v.* City of San Diego, 121 Cal., 104, said, with respect to the above quotation from Lord Mansfield:

> "But this, it should be noted, is rather a declaration of the principle than a definition of the disqualifying interest, and while in terms this case does not include the judges as coming within the principle of

> disqualification it is not to be doubted that it applies with equal strength and with more reason, to such an officer."

And in Tootle *v.* Berkley, 60 Kan., 446, it is said:

> "The principle of law which incapacitates a person from being judge in his own cause is extended so as to disqualify a judge who may have been of counsel for one of the parties in the case."

In State *v.* Crane, 30 N. J. L., 394, it is held that the legislature has no power to change the essential nature of judicial functions, and authorize a judgment in violation of the maxim that no person can be a judge in his own cause.

And the court in Washington Ins. Co. *v.* Price (N. Y.), Hopkins, Ch., 1, uses this language:

> "It is a maxim of every code, in every country, that no man should be judge in his own cause. The learned wisdom of enlightened nations and unlettered ideas of ruder societies are in full accordance upon this point; and wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where he is himself a party."

We refer also to the case of Matter of Hancock (N. Y.), 27 Hun., 78, and Lanfear *v.* Mayor *et al.*, 4 La., 97.

Judge Cooley, in his Constitutional Limitations, 413, says:

> "If the legislature is intrusted with apportioning and providing for the exercise of judicial power, we cannot understand them to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but it is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly."

And he says, 7th Ed., 594; in the text:

> "The people of the state when framing their constitution may possibly establish so great an anomaly if they see fit."

but in a foot note he adds:

> "Even this must be deemed doubtful since the adoption of the fourteenth article of the amendments to the Federal Constitution, which denies to the state the right to deprive one of life, liberty, or property, without due process of law."

We also refer to the case of Holden *v.* Hardy, 169 U. S., 389, for the proposition that it is an immutable principle of justice, which inheres in the very idea of a free government and which no member of the Union may disregard, that no man shall be condemned in his person or property without due notice and an opportunity of being heard before a tribunal capable by the law of its creation of administering justice impartially and without prejudice.

We contend, therefore, for the principle that due process of law requires an impartial tribunal for the determination of rights. The principle is not that every tribunal is impartial unless it has a pecuniary interest, and that a judicial tribunal shall not have a pecuniary interest. This is established by the case of *Ex parte* Ziebold, 23 Fed., 791, where the facts were these:

A statute of the State of Kansas provided that the prosecuting attorney might issue summons for witnesses and might examine them under oath, and might after that examination proceed with his prosecuting duties, and the question came up on *habeas corpus*, where a witness would not obey such summons, whether a prosecuting attorney could be clothed with judicial powers to be exercised about the same matter in which he was prosecuting attorney, and the court held—it may be noted that the prosecuting attorney in this case had no pecuniary interest in the matter—

that these judicial powers were not conferred on him to hear and determine matters in which he stood indifferent between the parties, but were given to aid and assist him in the performance of his ministerial duties, and for no other purpose, making the judicial powers auxiliary and subject to the ministerial, were given him as a means by which he could more successfully procure evidence upon which to institute and carry on prosecutions. It was held that these powers were very great, and, in the hands of an unscrupulous man, stimulated by animosity or avarice, could be utilized as a means of sore oppression. Because of this anomaly, the court held that the statute in question did not secure due process of law, and that the judicial power and the prosecuting power could not, under the fourteenth amendment to the constitution, co-exist in the same person in respect to the same matter.

So far as we are informed, there is one case, and one case only, in which this question has directly arisen. It has never, except in the case just referred to, arisen in this country in a case where an effort has been made to place in the hands of the same tribunal the whole body of power of a state in respect to an individual who must appear before it, where it was attempted in the same matter to make the same tribunal inquisitor, prosecutor, legislator, executive and judge, but in all the cases that are relied on by the Appellants there is a power that is judicial about one matter, and a power that is legislative about a different matter, and to be exercised in a different connection, or so slight an intermingling of powers as to make the range of their possible exercise stop this side of oppression. It is not unusual in our system of jurisprudence, and cannot, under the authorities, be questioned, that a power that is judicial about one matter, and a power that is legislative about a different matter, may be joined in the same person; but where the powers are to be exercised about the same matter against the same person, and the whole body of power in

respect to it is put in the hands of the same tribunal, that tribunal, when it comes to act as judge, must, in the nature of things, carry with it the prejudices of the inquisitor, of the detective, of the prosecutor, of the sponsor for the political policy which it has originated, and of a party in his own court—it must decide with the weight of partiality heavily upon it, and with not only the suspicion, but with the practical certainty, that it can not rid itself in announcing judgment of its predilections in favor of the measure which it has originated in its legislative or its prosecuting capacity. As we have said, there is one case where this question has arisen. There has been but one state in addition to Virginia that has attempted to create such a tribunal, and that was the State of Kansas when it created its court of visitation. Every power, legislative, executive and judicial, was present in this court of visitation in the State of Kansas that is present in the Commission of Virginia, except one. The Kansas court of visitation could not institute complaints before itself. The Virginia Commission can. But the Kansas Commission could inaugurate and adopt a policy, could make a rate, could give notice, hear and determine as a court. And what does the court say in that case? Western Union Telegraph Co. *v.* Myatt, 98 Fed., 341:

> "The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine as a rule for future observance the rates and charges for services rendered is wholly a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations, and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But be whatever name such boards or bodies may be called,

> or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction. As applied to this case, the power of the state to fix or limit the charges of telegraph companies for the transmission and delivery of telegraphic messages is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law and a denial of the equal protection of the laws, and therefore violative of the first section of the fourteenth amendment to the constitution, is a question for the courts."

And then the court proceeded, on page 344:

> "What, then, is the nature of the powers conferred upon the court of visitation? It is apparent from even a cursory examination of those parts of the act

of the legislature which define the primary powers and jurisdiction of that body that they are largely of a legislative or administrative character, and such as do not pertain to the functions of a court. It is difficult to define the precise difference between those that are legislative and those that are administrative. It is unnecessary, however, to do so, in this case, for it is immaterial whether the powers of that court, so called, aside from those that are judicial, are of the one character or of the other, or are a blending of both. A court does not (to use the language of the act) 'classify freight,' nor 'require the construction and maintenance of depots, switches, side tracks, stock yards, cars and other facilities for the public convenience,' nor 'regulate crossings and intersections of railroads,' nor 'regulate the operation of trains' over such crossings and intersections, nor 'prescribe rules concerning the movement of trains to secure the safety of employés and the public,' nor 'require the use of improved appliances and methods to avoid accidents and injuries to persons,' nor 'apportion transportation charges among connecting carriers,' nor 'regulate charges for part car load and mixed car load lots of freight, including live stock,' nor prescribe what rates of transportation of freight and passengers shall be charged. The regulation of such matters is legislative in its character, not judicial. * * * Of course, courts of chancery, in the exercise of their equity jurisdiction, may, and frequently do, through the medium of receivers, appointed by them, exercise some of such powers in the administration of property which is the subject-matter of litigation in such courts, and especially where, in order to preserve the value of such property while it is in the possession of the court, it is necessary to continue the operation thereof, and maintain it as a going concern. But it is not in such sense that these powers were conferred upon the court of visitation. Courts also have the undoubted power to determine some of these matters, if they properly lie in the road to the ultimate adjudication of other existing controversies concerning which the jurisdiction of the court has been invoked; as, by way of illustration, where, in litigation, over the destruction of life or property in a railroad acci-

dent, it becomes material to ascertain whether the company used proper appliances and methods to avoid such an occurrence. Nor is it to this end that the powers mentioned were conferred upon the court of visitation. The exercise of the powers granted contemplates the prescribing of rules and regulations for future guidance, and the possession of such powers by the court of visitation makes it one of the potential agencies of the legislative department of the state. To use the expression of a learned justice of the supreme court, the court of visitation, in respect of such functions, is 'an active, seeking, supervising body; the eye and the activity of the state.' As to such powers and duties the court of visitation is not, and cannot be, a court. Practically all of the powers then possessed by the board of railroad commissioners of Kansas, which was purely an administrative body, were conferred upon the court of visitation, and as an evidence of the legislative purpose and intent the then existing laws relating to the appointment, powers and duties of the board of railroad commissioners were, by act of the legislature, repealed a few days after the passage of the act creating the court of visitation."

Now, at page 346:

"The legislature may create a court of visitation, but it can only be a court in respect to matters of a judicial nature, and such as are properly incidental thereto. It is clear, however, that it was the intention of the legislature in the enactment of the law to confer certain judicial powers upon the court of visitation in respect of the same matters over which that court was authorized to exercise legislative and administrative functions. It was clearly the legislative intent to confer upon the court of visitation not only the power to prescribe rules and regulations for the government of railroad and telegraph companies in their relations to the public and to each other, but also the power to pass judicially upon the validity of such rules and regulations, to render judgment accordingly, and full power to execute their orders and judgments."

And then quoting approvingly from Chancellor Kent in the case of Dash *v.* Van Kleeck, 7 Johns., 477, the following:

> "It is a well settled axiom that the union of these two powers is tyranny. Theorists and practical statesmen concur in this opinion."

And then, at page 352, the court said:

> "A division of powers in a general view is what is meant, as is pointed out by Mr. Justice Story. The departments are politically connected, and to some extent they are interdependent, but their functions, being essentially different, are not blended, nor do they occupy a common ground, or exercise concurrent jurisdiction over the same subject-matter."

After discussing the matter at length, the court said, page 354:

> "In view of what has been said of the court of visitation and the nature of the various powers conferred upon it, would a judicial proceeding before said court to determine the reasonableness of a body of rates be due process of law, within the meaning of the first section of the fourteenth amendment to the constitution? Due process of law in judicial proceedings means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In legislative proceedings it requires a conformity to the settled maxims of a free government, and an observation of constitutional restraints and requirements. In either case it means that there should be an omission to exercise substantial powers appertaining to the other department. Courts cannot legislate and pass judgment thereon. Legislative bodies, or boards that are constituted as legislative agencies, cannot render judgment upon their legislative acts. In either case neither the proceedings nor the result would be due process of law."

It seems, therefore, settled, both upon principle and authority, that the whole body of power of a state in respect

to the same subject-matter, legislative, executive and judicial, can not, consistently with due process of law, be conferred upon the same tribunal.

If this be so, it can not be said that the Constitution of Virginia would have conferred upon the Commission the rate making or legislative power without conferring the other powers referred to. They are so intermingled that they are inseparable, and if the union makes the possession of any one of them unconstitutional under the Fourteenth Amendment to the Constitution of the United States, they all must fall, and the State be left to regulate rates through its legislature or by a commission to be established, in accordance with law, either by the legislature, or by another fundamental enactment.

II.

THE APPEAL PROVIDED FOR TO THE SUPREME COURT OF APPEALS OF VIRGINIA FROM THE ACTION OF THE COMMISSION IN MAKING RATES DOES NOT AVOID THE UNCONSTITUTIONALITY REFERRED TO UNDER THE NEXT PRECEDING HEAD, BUT IS ITSELF INVALID UNDER THE FOURTEENTH AMENDMENT.

We respectfully contend that this requirement of due process of law is not restored by the appeal given to the Supreme Court of Appeals of Virginia. That appeal is itself subject to the same objection which has been made to the Commission. There is no reason for discussing this question in relation to anything but the case at bar. In respect to rate making, which is the case at bar, the only appeal which is given is to the Supreme Court of Appeals of Virginia. The Constitution provides for an appeal to that body from any order of the Commission "prescribing rates" etc., and further provides in sub-section (*g*) of Section 156 as follows:

> "Whenever the court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or

> transmission company, it shall, at the same time, substitute therefor such order as, in its opinion, the commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid."

It is thus required by the Constitution that, if the Supreme Court of Appeals decides in favor of the railroad companies, and, acting on the Commission's rates, rejects them, then it must *at the same time* become a legislative body to make a rate which shall take the place of the one which is rejected. In other words, the very evil, the very vice, the very exercise of unlimited and absolute power growing out of the union of the legislative and the judicial functions in regard to rates which destroys the Commission itself, is by the Constitution injected into the Supreme Court of Appeals of the State, it being made not only a judicial body, but also a legislative body, to legislate a rate, as a condition precedent to being permitted to decide the case in favor of the railroad company.

Moreover, as has been heretofore shown at pages 67 and 68 of this brief, in discussing the powers of the Supreme Court of Appeals of Virginia on such appeal, the rates which the court is required to fix, in the place of those which it rejects, are rates in respect to which the interested company has had no opportunity for a hearing, and therefore, as well as for the other reasons just given, the remedy of appeal does not satisfy the requirements of due process of law.

It has been determined that if this Commission does not afford us due process of law, because of the union of all these powers in respect to the same matter, being thereby made a partial tribunal by the law of its creation, then the fact that we are given an appeal to another body which in itself unites the same legislative and judicial functions does not cure the vice, or turn that which was an invalid exercise of power into due process of law. In the case of

Pittsburgh R. R. Co. *v.* Backus, 154 U. S., 427,

and in

Reetz *v.* Michigan, 188 U. S., 508,

it is determined that if a single hearing is not due process of law, doubling it before another tribunal, which itself does not satisfy the requirements of due process of law, does not make due process of law. If we do not get due process of law before the Commission because it must, in obedience to the law of its creation, legislate and judge about the same matter, thus exercising absolute power, we do not get due process of law before the Supreme Court of Appeals, because it must legislate and judge about the same matter, and thus exercise absolute power. If we do not have due process of law in a single tribunal, giving us the right to go thence into another vicious tribunal does not constitute due process of law.

The newness of this Virginia device of ascertaining and administering justice—previously untried under any system of constitutional government—is one of its most conspicuous characteristics. It can hardly be said to measure up to that requirement of "due process of law" which insists upon the machinery and methods approved "by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy."

In this case is presented the far-reaching and important question whether it is competent for a state to subject any interest within its borders entirely to government by commission.

If it can be done, there is an end of liberty in this Republic. Power of a state to deprive a person of protection to his constitutional rights through the Federal courts, by the device of conferring all power upon one tribunal of its own,

is unchecked and unlimited power of destruction. Power of a commission to exercise all the powers of a state, legislative, executive and judicial, is absolute power—is capacity for tyranny. If it can constitutionally be made to apply to one interest, it can constitutionally be made to apply to every interest in the state. It is not unlikely to be so applied to any interest that for the moment may be under the ban of popular disfavor.

The only protection against it is the Constitution of the United States. Without that Constitution, and the Federal courts created by and pursuant to it to construe and enforce its provisions, law would no longer embody great and universal principles of justice, but would become the mere expression of the passion and caprice of those who for the time being constitute the popular majority.

Whether this can be, is the momentous issue presented by the case at bar.

Respectfully submitted,

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WASHINGTON, D. C., *October*, 1908.

APPENDIX.

Sections 155 and 156, Constitution of Virginia.

Sec. 155. A permanent commission, to consist of three members, is hereby created, which shall be known as the State Corporation Commission. The commissioners shall be appointed by the Governor, subject to confirmation by the General Assembly in joint session, and their regular terms of office shall be six years, respectively, except those first appointed under this Constitution, of whom, one shall be appointed to hold office until the first day of February, nineteen hundred and four, one, until the first day of February, nineteen hundred and six, and one, until the first day of February, nineteen hundred and eight. Whenever a vacancy in the commission shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term, subject to confirmation by the General Assembly as aforesaid. Commissioners appointed for regular terms shall, at the beginning of the terms for which appointed, and those appointed to fill vacancies shall, immediately upon their appointments, enter upon the duties of their office; but no person so appointed, either for a regular term, or to fill a vacancy, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment, or adjourned *sine die* without confirming the same, nor shall he be eligible for re-appointment to fill the vacancy caused by such refusal or failure to confirm. No person while employed by, or holding any office in relation to, any transportation or transmission company, or while in any wise financially interested therein, or while engaged in practicing law, shall hold office as a member of said commission, or perform any of the duties thereof. At least one of the commissioners shall have the qualifications prescribed for judges of the Supreme Court of Appeals; and any commissioner may be impeached or removed in the manner provided for the impeachment or removal of a judge of said court. The commission shall annually elect one of their members chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be

provided by law, all of whom shall be appointed, and subject to removal, by the commission. It shall prescribe its own rules of order and procedure, except so far as the same are specified in this Constitution or any amendment thereof. The General Assembly may establish within the department, and subject to the supervision and control, of the commission, subordinate divisions, or bureaus, of insurance, banking or other special branches of the business of that department. All sessions of the commission shall be public, and a permanent record shall be kept of all its judgments, rules, orders, findings and decisions, and of all reports made to, or by, it. Two of the commissioners shall constitute a quorum for the transaction of business, whether there be a vacancy in the commission or not. The commission shall keep its office open for business on every day except Sundays and legal holidays. Transportation companies shall at all times transport, free of charge, within this State, the members of said commission and its officers, or any of them, when engaged on their official duties. The General Assembly shall provide suitable quarters for the commission and funds for its lawful expenses, including pay for witnesses summoned, and costs of executing processes issued, by the commission of its own motion; and shall fix the salaries of the members, clerks, assistants and subordinates of the commission and provide for the payment thereof; but the salary of each commissioner shall not be less than four thousand dollars per annum. After the first day of January, nineteen hundred and eight, the General Assembly may provide for the election of the members of the commission by the qualified voters of the State; in which event, vacancies thereafter occurring shall be filled as hereinbefore provided, until the expiration of twenty days after the next general election, held not less than sixty days after the vacancy occurs, at which election the vacancy shall be filled for the residue of the unexpired term.

Sec. 156. (*a*) Subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered

by, or doing business in, this State. The commission shall prescribe the forms of all reports which may be required of such corporations by this Constitution or by law; it shall collect, receive, and preserve such reports, and annually tabulate and publish them in statistical form; it shall have all the rights and powers of, and perform all the duties devolving upon, the Railroad Commissioner and the Board of Public Works, at the time this Constitution goes into effect, except so far as they are inconsistent with this Constitution, or may be hereafter abolished or changed by law.

(*b*) The commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of

such company. Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws: provided, however, that nothing in this section shall impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county

granting the franchise. Upon the request of the parties interested, it shall be the duty of the commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons.

(*c*) In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the commission, within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed, or authorized, by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the commission, shall be a separate offence; provided, that should the operation of such order or require-

ment be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

(*d*) From any action of the commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suepending bond, or requiring additional security thereon or an increase thereof, as provided for in sub-section *e* of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges or classifications of traffic, schedule, facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the Commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts, except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the Commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws, provide for appeals from any other action of the commission, by the Commonwealth or by any person interested, irrespective of the amount involved. All appeals from the commission shall be to the Supreme Court of Appeals only; and in all appeals to which the Commonwealth is a party, it shall be represented by the Attorney-General or his legally appointed representative. No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties: provided, however, that the writs of *mandamus* and prohibition shall lie from the Supreme Court

of Appeals to the commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer.

(*e*) Upon the granting of an appeal, a writ of *supersedeas* may be awarded by the appellate court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the appellate court, no action of the commission prescribing or affecting the rates, charges or classifications of traffic of any transportation or transmission company shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceedings resulting from such appeal, until a suspending bond shall first have been executed and filed with, and approved by, the commission (or approved on review by the Supreme Court of Appeals), payable to the Commonwealth, and sufficient in amount and security to insure the prompt refunding, by the appealing corporation to the parties entitled thereto, of all charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the court on appeal. The commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any *supersedeas*), of the order or requirement appealed from, to keep such accounts, and to make to the commission, from time to time, such reports, verified by oath, as may, in the judgment of the commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the commission appealed from, together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company pending the appeal, be not sustained on such appeal; and the commission shall also, from time to time, require such company, under like penalty, to give additional security on, or to increase, the said suspending bond, whenever, in the opinion of the commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid. Upon the final decision of such appeal, all amounts which the appealing company may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the company to the parties entitled thereto, in such manner, and through such methods of distribution, as may be prescribed by the commission, or by law. All such appeals affecting

rates, charges or classifications of traffic, shall have precedence upon the docket of the appellate court, and shall be heard and disposed of promptly by the court, irrespective of its place of session, next after the *habeas corpus*, and Commonwealth's, cases already on the docket of the court.

(*f*) In no case of appeal from the commission shall any new or additional evidence be introduced in the appellate court; but the chairman of the commission, under the seal of the commission, shall certify to the appellate court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission as may be selected, specified and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify. The commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the appellate court, upon disposing of the appeal. The appellate court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the commission appealed from, as well as any other matter arising under such appeal: provided, however, that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct: but the court may, when it deems necessary, in the interest of justice, remand to the commission any case pending on appeal, and require the same to be further investigated by the commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the commission by any party in interest), before the appeal is finally decided.

(*g*) Whenever the court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such order as, in its opinion, the commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the commission at the time the original order appealed from was entered. The right of the commis-

sion to prescribe and enforce rates, charges, classifications, rules and regulations, affecting any or all actions of the commission theretofore entered by it and appealed from, but based upon circumstances or conditions different from those existing at the time the order appealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the commission, prescribing or altering such rates, charges, classifications, rules, or regulations, shall be retroactive.

(h) The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the commission; but, in no such proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the commission, within the scope of its authority, and then in force, be questioned: provided, however, that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof.

(i) The commission shall make annual reports to the Governor of its proceedings, in which reports it shall recommend, from time to time, such new or additional legislation in reference to its powers or duties, or to the creation, supervision, regulation or control of corporations, or to the subject of taxation, as it may deem wise or expedient, or as may be required by law.

(k) Upon the organization of the State Corporation Commission, the Board of Public Works and the office of Railroad Commissioner, shall cease to exist; and all books, papers and documents pertaining thereto, shall be transferred to, and become a part of the records of, the office of the State Corporation Commission.

(l) After the first day of January, nineteen hundred and

five, in addition to the modes of amendment provided for in Article Fifteen of this Constitution, the General Assembly, upon the recommendation of the State Corporation Commission, may, by law, from time to time, amend sub-sections *a* to *i*, inclusive, of this section, or any of them, or any such amendment thereof: provided, that no amendment made under authority of this sub-section shall contravene the provisions of any part of this Constitution other than the sub-sections last above referred to or any such amendment thereof.

To be read in connection with page 62 at end of
int V in "Brief of Argument of Appellees," and also
connection with page 46 of "Supplemental Brief
r Appellees on the Question of Jurisdiction."

But we are fortunate in having a decision of the Supreme Court of Appeals of Virginia bearing upon this very question, and on which we rely, viz.:

Atlantic Coast Line Ry. Co. *et als v.* Comth. of Va. (March 24, 1904), 102 Virginia, 599. This was a case involving storage, demurrage and car service charges promulgated by the State Corporation Commission of Virginia under authority of the Constitution of Virginia, Section 156. The exercise of the power to establish storage, demurrage and car service charges is given in the same language by the same section of the Constitution with the power to promulgate and establish rates. The power of the Commission to establish storage, demurrage and car-service charges is identical with the power to establish rates. The Constitution, Section 156, sub-section (*b*), provides that the Commission shall have the power and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in Virginia, and in all matters relating to the performance of their public duties, and their charges therefor, and of correcting abuses therein by such companies; and to that end the Commission shall, from time to time, prescribe, and enforce against such companies, in the manner thereinafter authorized, such rates, charges, classification of traffic and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the Commission may, from time to time, alter or amend. It being further provided, that before the Commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any rate, order, rule, regulation or requirement directed against any one or more companies, it shall give notice and have a hearing; the authority of the Commission (subject to review on appeal, as provided) to prescribe rates, charges and classifications of traffic shall be paramount, but its authority to prescribe any other rules, regulations or requirements shall be subject to the superior authority of the General Assembly to legislate thereon by general laws.

By sub-section (*d*) it is provided that from any action of the Commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon, or an increase thereof, an appeal may be taken to the Court of Appeals.

There was duly given the notice and hearing provided for; the Commission sat with all the form, as counsel for the appellants have set out so fully, spent days in the examination of witnesses, arguments of counsel, etc. The Federal question under the commerce clause was duly raised on the record, as will be seen (102 Virginia, 613), and the objection properly made that each and all of the charges, rules and regulations were in violation of the commerce clause of the Constitution of the United States, and that certain of them deprived the railway companies of the use of their property without due process of law and was in violation of the Fourteenth Amendment. Not knowing what would be the effect of the order of the Commission, an appeal was taken to the Court of Appeals of Virginia, and Judge Buchanan, in delivering the opinion of the court, said (pp. 618-619):

> "To hold that they are invalid, so far as they apply to interstate and foreign commerce, as the appellants insist should be done, might have the effect of depriving the State of her undoubted right, under her reserved powers, to make provisions for the purpose of enforcing the obligations of transportation companies to accommodate the public, and for regulating the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public convenience and the public good, when such regulations are in aid of, or only incidentally affect, interstate commerce, and do not violate any right protected by the Constitution of the United States.
>
> "To hold, on the other hand, that the rules would not, in their operation, directly intrench upon the authority

of the United States, nor violate any right protected by the Federal Constitution, might result in our denying transportation companies and others their just rights under the Constitution and laws of the United States, *and drive them to the Federal courts for the assertion and maintenance of rights* which ought to be guarded and enforced by the courts of the State, whose government they support, and from which they are entitled to protection." (Italics ours.) "For these and other reasons, which might be given, we are of opinion that we ought not, upon this appeal, to attempt to decide to what extent, if at all, the said rules and regulations, in their operation, may directly infringe upon the commerce clause of the Constitution of the United States, or violate any right of the appellants under that instrument, and that the decision of those questions can only be properly made as they arise in concrete cases, and upon the particular facts of each case.

" It is insisted by the appellants' counsel that if no relief is given them upon this appeal, as to the validity of the rules in question, their validity is, by the express terms of the Constitution, made conclusive, and cannot be questioned in an action or suit based upon the rules, and that no other provision is made by the Constitution by which their validity can be questioned, except in *quasi*-criminal proceedings, which the commission is authorized to institute against them for alleged violation of the said rules and regulations" * * * (page 621). "We are further of opinion that the question of their validity, so far as affected by the Constitution of the United States, may be raised and determined *in any case in which that question could be raised and determined, if the rules and regulations in question had been enacted as statutes by the General Assembly*, except as prohibited by sub-section "d" of Section 156 of the Constitution, (which subsection is not in point here, and has no relation to this matter). (Italics ours.)

In further confirmation of this, see

Southern Ry. Co. v. Commonwealth, 107 Va., 771. In this case there was drawn in question the validity of Rule 1 prescribed by the State Corporation Commission, which requires transportation companies unconditionally to furnish empty cars to shippers within four days after application therefor, and imposes a penalty for its violation.

The Court of Appeals of Virginia held that this Rule 1 imposes an unreasonable burden on interstate commerce, and was in conflict with the Act of Congress regulating interstate commerce. Cardwell, Judge (with whom Keith, P., concurs), said (p. 772):

> "The rules established by the State Corporation Commission for the regulation of transportation companies and shippers doing business in this State came under review in Atlantic Coast Line Railway Co. v. Commonwealth, 102 Va., 599, 46 S. E. 911, and it was held that, while said rules and regulations, as applied to transportation companies and shippers doing business in this State, are reasonable, just and valid, whether said rules and regulations do, in their operation, directly infringe upon the commerce clause of the Constitution of the United States, or violate some right of such companies or shippers protected by that instrument, can be properly determined only as the questions arise in concrete cases, and upon the particular facts of each case." * * *

(P. 775):

> "That shipments of freight from this State into other States is interstate commerce requires no argument or citation of authority." * * *

(P. 777):

> "Under the requirements of the rule, the equipment of the carrier from other States might have to be withdrawn to an extent neccessarily and directly obstructing the movement of interstate commerce originating in such other States. * * *

"The constitutional validity of a law is to be tested, not by what has been done under it but by what may be done. Stuart v. Palmer, 74 N. Y., 191; 30 Am. Rep., 289; Violette v. Alexandria, 92 Va., 561; 23 S. E., 909; 53 Am. St. Rep., 825; 31 L. R. A., 382." * * *

(P. 785):

"We are of opinion, for the reasons stated, that Rule 1 of the series of car-service and demurrage rules, established by the State Corporation Commission for the government of transportation companies and shippers doing business in this State, here in question, as applied to this case, is invalid and void, because in conflict with the commerce clause of the Constitution of the United States. Therefore, the judgment of the Commission appealed from will be reversed and annulled, and this proceeding dismissed."

Whittle, Judge, concurred in the opinion of Judge Cardwell that Rule 1, in question, was not a reasonable exercise of the police power of the State with respect to furnishing cars for interstate shipments, but was of opinion that it was within the competency of the State Corporation Commission, in the absence of legislation by Congress, to establish reasonable rules and regulations, whether the freight be intended for intra or interstate shipment.

While Buchanan and Harrison, Judges, were of the opinion that the State, under its police or reserve powers, had the right to make reasonable regulations as to the furnishing of cars, not only for intrastate, but also interstate shipments, and for that reason did not concur in the reasoning of the other judges, yet they did concur in the conclusion that Rule 1 of the State Corporation Commmission was invalid as being an improper regulation of interstate commerce.

Thus it will be seen that the entire Court of Appeals of Virginia entered a unanimous judgment and order that Rule 1, which had been under consideration along with the other rules in A. C. L. Ry. Co. v. Commonwealth, 102 Va., 599, was

invalid under the commerce clause of the Constitution of the United States.

If they had considered the action of the State Corporation Commission a final judgment and ascertainment on notice and hearing of the validity of Rule 1, along with the validity of the demurrage and car service rules from which the appeal was taken in the A. C. L. case, 102 Va., 599, so that the question was *res adjudicata* as the judgment of a court of competent jurisdiction acting judicially upon the subject matter, they would have stultified themselves in holding in the case of Southern Ry. Co. *v.* Commonwealth, 107 Va., 771, the rule to be invalid.

This, it is submitted, completely disposes of the contention of counsel for appellants that the action of the State Corporation Commission complained of in these proceedings is *res adjudicata*, because the result of the Commission's act in this case prescribing a two-cent rate was in its nature and character the same as the result of the Commission's action in the demurrage case (102 Va.), which the Supreme Court of Appeals of Virginia declared to be a legislative result subject to inquiry by any court of competent jurisdiction in any concrete case.

It will be noted that this case is the last pronouncement of the Court of Appeals of Virginia upon this subject, and subsequent to any case cited by counsel for appellants in their briefs.

It is perfectly clear, therefore, that the Supreme Court of Appeals of Virginia has recognized the right of railway companies to appeal to the jurisdiction of the Federal courts for the protection of their rights under the Constitution and laws of the United States, being of the opinion that the action of the State Corporation Commission of Virginia in establishing rates, charges, classifications, rules, and requirements of traffic may be raised and determined in any case, and in any court in which the question could be raised and determined, if the action in question has been enacted as a statute by the General Assembly, and therefore that the action of the State Corporation Commission was not *res adjudicata*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1908

ROBERT R. PRENTIS, HENRY C. STUART AND JOSEPH E. WILLARD, Individually and as constituting the STATE CORPORATION COMMISSION OF VIRGINIA, and R. T. WILSON, Clerk of the STATE CORPORATION COMMISSION OF VIRGINIA, ... Appellants

vs. No. 270.

ATLANTIC COAST LINE RAILROAD COMPANY, ... Appellee,

SAME ..... Appellants

vs. No. 271.

CHESAPEAKE & OHIO RAILWAY COMPANY, ... Appellee,

SAME ..... Appellants

vs. No. 272.

CHESAPEAKE WESTERN RAILWAY ..... Appellee,

SAME ..... Appellants

vs. No. 273.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee,

SAME ..... Appellants

vs. No. 274.

NORFOLK & WESTERN RAILWAY COMPANY, ... Appellee,

SAME ..... Appellants

vs. No. 275.

SOUTHERN RAILWAY COMPANY ..... Appellee.

Appeals from Circuit Court of the United States for the Eastern District of Virginia.

Six Cases Heard Together.

NOTE OF ARGUMENT

of

A. CAPERTON BRAXTON,

of Counsel for Appellants.

[**Memo: This note is filed on behalf of the Appellants in all six of the above named Virginia Corporation Commission Cases, heard together. For convenience, however, all references made herein to the Record, by pages, are to the printed Record in the Atlantic Coast Line Railroad Case (No. 270), except where the Record in some other of the cases is specifically mentioned.**]

Introductory

The attention of thoughtful persons has long been called to the embarrassments arising from the regulation of railroad rates, in the same territory, by two separate governments acting independently of each other—the Federal Government regulating **inter**-state rates, and the State Government regulating **intra**-state rates—and some earnest minded men have thought that the difficulty must ultimately be met by relegating all rates—inter-' as well as intra-state—to the exclusive control of the Federal Government. But, be this as it may, the fact remains that, as yet, the Federal Government has no legal right to regulate intra-state rates, and whether it should ever be given that right is a question of statecraft with which the courts have no concern, and which involves, not judicial decisions, but legislative enactments, if not Constitutional Amendments.

The history of America will show that, from the beginning of the Nation, the most numerous and troublesome problems, of a public, or quasi-public, nature, which have consumed the time and thought of its legislative and judicial bodies, have resulted from complications arising out of our dual form of government, rather than from the innate difficulties of the subject matter itself, and the regulation of railroad rates may fairly be classed among such problems. The advantages, however, of our dual government, so far exceed its defects that we must not grow impatient with its complications. A sail ship is less complicated and more easily managed than a steamer; but the services of the steamer are far more valuable. Hence, we should move slowly in abandoning the fine, even though complicated, machinery of our dual government in respect to railroad rates, and, certainly, should we not give it up until every reasonable method has been tried to make it work successfully.

The question, however, with which the courts have to deal now, is not whether the State should be allowed to regulate intra-state rates—for under existing laws, such rates must be regulated by the States or else be wholly uncontrolled and

above the law—but, rather, the question is, whether, under the law and with due regard to all the fundamental rights of the individual citizen, the State may, in any effective manner, exercise a conceded and most important governmental power, or must such power remain a dead letter, existing in name only.

Heretofore, our governmental machinery for the regulation of intra-state rates, has developed only friction, discord and clashings between State and Federal authorities, resulting in inefficiency and failure and producing only class animosities, clamorous discontent, popular disgust, and continuous agitation and unrest.

Surely, governmental machinery **can** be devised which is capable of turning out better work than this.

Surely, there is no natural inconsistency, no necessary antagonism, between those great fundamentals—"due process", and "equal protection"—on the one hand, and the equally essential "control by government of the public highways", on the other. And yet, under the governmental machinery heretofore in use, we have been able to preserve the former, only by paralyzing the latter.

What has been the difficulty? Chiefly this: that we have attempted to segregate, and assign respectively to different tribunals to be independently considered and disposed of, the inseparable halves of an essentially indivisible problem.

The problem involved in any proposed rate, presents two questions—its **reasonableness,** and its **expediency.**

In the nature of things, these two questions are inseparably interwoven, and their solution involves identically the same facts, and, practically, the same principles and considerations. It is an intellectual impossibility to decide one of these questions, without mentally deciding the other also. And yet, under the machinery heretofore existing, we have relegated them, for decision separately, to distinct tribunals, which act not only independently of each other, but at widely different times and oftimes upon **essentially different facts.**

Herein lies the chief weakness in former methods, and from this has sprung, directly and indirectly, most, if not all, of the minor defects of the old system.

To correct this basic fault, the late Constitutional Convention of Virginia addressed itself most earnestly for many

months, the result of its labors being the present Virginia State Corporation Commission, created by the Twelfth Article of the new State Constitution, the validity of which, under the Federal Constitution, is practically the sole issue in these cases.

By this Constitutional enactment, the consideration and determination of **both the reasonableness and the expediency** of a proposed rate, is left to **one single tribunal,** specially constituted with a view to the just and wise exercise of the rate-making function, which requires a technical knowledge of the subject-matter that no ordinary Judge or Master could possibly possess. The tribunal is made a **regular court of record,** with the fullest right to parties to introduce all the evidence they desire, with right of appeal, immediately to the highest court in the State, from any and every ruling of the Commission, but with the requirement that the appeal must be **heard upon the record** as made, and not upon a new state of facts. To prevent the deterrent effect of accumulating penalties, preventing or discouraging the free exercise of the right of appeal, ample provision is made for **suspending the operation of any order appealed from,** till the appeal be decided.

Whatever may be established by the skillful use of mere verbal logic and the adherence to the forms, rather than to the substance, of ancient maxims, it is confidently believed that, in the structure and operation of the Virginia State Corporation Commission, every **essential right** of the carrier, and every **essential element** of "due process of law", has, in truth and in fact, been faithfully respected and elaborately and most **effectively provided for.** Therefore, the solemn decisions of that body—second only in dignity, among the institutions of the State, to the Supreme Court itself—should not be ignored nor collaterally attacked, but should be obeyed or appealed from, as provided by law.

Chapter I.

THE GENERAL CHARACTER OF THE VIRGINIA STATE CORPORATION COMMISSION.

The Virginia State Corporation Commission is **sui generis,** and essentially different from any other Corporation or Railroad Commission in America.

It was created, and its functions, powers, duties, and the essentials of its procedure, were prescribed in detail, by the **Constitution** of the State, and not merely by a **statute.**

It was made, primarily and essentially, a **judicial court of record,** of limited jurisdiction, to which were **added** certain special legislative and executive powers.

When it is proposed, or contemplated, to make a change in a rate of a public service corporation, or otherwise to prescribe a new regulation therefor, the law requires the Commission, "sitting as a court", to issue its process, in the nature of a Rule, against the corporation concerned, requiring it to appear before the Commission at a certain time and place and show cause, if any it can, why the proposed regulation or rate be not prescribed.

The **judicial question** involved in the hearing upon the return of such Rule is whether or not the contemplated rate or regulation is confiscatory, or otherwise unjust or unreasonable, and, in the hearing and disposition of this question, the proceedings of the Commission, as prescribed by law, are, in every respect and particular, exactly the same as those of any other judicial court of record;—it has its own clerk and bailiff; it issues, executes and enforces its own writs and processes; it can issue and enforce writs of **mandamus** and injunction; it punishes for contempt, disorderly conduct or disobedience to its decrees or orders; it keeps a complete record and docket of its proceedings; it summons witnesses, and compels their attendance, and the production of documents; it rules upon the admissibility of evidence; it notes, records and, upon appeal, certifies any exceptions to its rulings; its judgments, decrees and orders have exactly the same force

and effect of those of any other court of record in the State, and are enforced by its own proper executive processes, without either the duty or the power to resort therefor to any other court; it is not subject to injunctive process from any other State court; and, from any and every ruling or decision by it, an appeal lies to the Supreme Court of Appeals of the State, and is heard upon the record made before, and certified by the Commission, exactly as in the case of appeals from any other court, and, pending the decision of such appeal, the order appealed from may by a supersedeas, be suspended in its operation.

Not only do the Constitution and laws of Virginia thus make the State Corporation Commission a judicial court of record by clothing it with all the attributes of such a tribunal, but they expressly designate it a court, and require it to proceed only by "due process of law", to inquire into and determine every judicial question coming before it.

In addition to this, the Commission has repeatedly held itself to be such a court and subject to all the obligations thereof; and the **Supreme Court of Appeals,** the highest State judicial tribunal, has formally and expressly so held.

When this special judicial court shall have, in the manner above indicated, fully heard all parties interested, and, proceeding by due process of law as to them, judicially determined that a proposed rate or regulation is not confiscatory nor otherwise unjust or unreasonable, then, but not until then, it is authorized, by the Constitution and laws of Virginia, to enter an order prescribing such rate or regulation,—from which order an appeal (on the judicial question of its reasonableness or legal validity) lies to the Supreme Court of Appeals, with **right of suspension,** by supersedeas, **pending the appeal, as aforesaid.**

If the technical nature of such an order be still an open question, it may well be called a mere injunction order, enjoining and restraining the company from charging a different rate from that named, until the further order of the Commission, just as, in the case of interstate commerce, a Federal court may order a railroad company to "cease and desist" from thereafter charging certain indicated rates. But, if it be thought that, for any cause, the prescribing of a rate, **after** (rather than **before)** it has been judicially determined

to be reasonable, is necessarily a legislative act, then, the **Constitution** of the State—not merely the **statutes**—expressly confers and super-poses upon this special judicial court the **legislative power** of prescribing a rate, after it has judicially ascertained and decided it to be not below the limit of reasonableness.

One of the essential particulars in which Virginia differs from all other States, in its treatment of the rate making problem, is that by its **Constitution**—not merely by statute—the **judicial** question of the reasonableness of a given rate is inquired into and determined on the **day before** the rate is prescribed, rather than on the **day after** it is prescribed,—the question, in either case, being settled before the rate is **enforced,** and, in both cases, the nature of the inquiry, the character of the tribunal, and the method of the proceeding, being the same,—that is, whether the judicial enquiry into the reasonableness of the contemplated rate **precedes** or **follows** the act (legislative if you choose) of **prescribing** it.

Chapter II.

HISTORY OF THE CASES.

The foregoing, in brief, is the general nature and character of the Virginia State Corporation Commission, which, on July 31, 1906, issued and caused to be duly served a notice to the "Steam Railroad Companies doing business in Virginia and all persons interested," that, at 12 o'clock noon, on November 1, 1906, at Richmond, the Commission would

> **"hear and consider any objections which may be urged against a rule, regulation, order or requirement of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia." (Rec., 5, 71, 121.)**

Accordingly, on November 1, 1906, the Appellee Company appeared before the Commission, and filed its Answer in writing, setting forth why, in its opinion, the proposed two cent rate would be less than reasonable. (R., 49, 7, 122, 72.)

The Commission, thereupon, entered into a most lengthy, thorough, painstaking, judicial hearing of this question of the reasonableness of the proposed rate, in which hearing the Appellee Company was represented by counsel and introduced elaborate evidence. (R., 7, 73, 119-128.)

No evidence was taken or considered save publicly, in the open sessions of the Commission, when appellee was given the fullest opportunity (of which it availed itself) to be present, introduce its own testimony (by witnesses and documents) to cross-examine opposing witnesses, object to the introduction of witnesses or documents, and to except, of record, to any ruling whatever of the Commission.

No evidence was rejected which any railroad company offered. The **hearing was continued for several months,** and the case was not closed until the companies involved had **formally announced in open court that they had nothing more to offer or say.** (R., 76, 128.)

On April 27, 1907, practically six months after the hearing began, the Commission entered its order, (which is the basis of Appellee's complaint in this cause), accompanied with an elaborate written opinion, filed with the record of the Commission, and which will be seen in this record as "Ex. No. 5" with the defendants' (Appellants') Answer to the Rule herein. (See R., 73, 129, 132-165.)

By this order, certain passenger rates—in no case less than two cents per mile—were prescribed for the defendant railroad companies (among them being these Appellees), to go into effect on July 1, 1907, the Commission being of opinion, and so deciding, that the rates therein fixed were not confiscatory nor otherwise unjust or unreasonable to said companies.

From this decision and order of the Commission, the Constitution and Statutes of Virginia provide that an **appeal of right may be at once taken,** by any company affected, to the Supreme Court of Appeals of the State, which shall review the case upon the record as made up before the Commission. This record is kept, in every respect, exactly like the record of causes in the ordinary courts, and includes every document read, and a **verbatim** stenographic report of all oral testimony adduced before the Commission. (See Appellants' Answer to the Rule herein, and exhibits therewith, R., 73-74, 119-131.)

If, by mistake, oversight or inadvertence, any evidence may have been omitted by the company at the trial before the Commission, then, on application, the Appellate Court will send the cause back for further evidence. (See Va. Constitution, Sec. 156, sub-sec. (**f.**), R., 48.)

Upon the taking of such appeal, the order of the Commission, appealed from, can be **suspended in its operation** till the appeal be determined, the company thus being enabled to **continue its old rates,** pending the appeal, **without hazard of any penalties for so doing.** (See Va. Constitution, Sec. 156, sub-sec. (**e.**), R., 47.)

Should circumstances, at any time after the decision by the Commission, so change as, in the opinion of the railroad company, to require, or justify, a modification of the Commission's order, then, the company would be at liberty, at any time, irrespective of a pending appeal, to make application to the Commission (which is always open to receive and hear such), for a modification of its order in view of such subsequently occurring circumstances, and to introduce evidence and be fully heard thereon, **with right of appeal** from the Commission's rulings, just as in other cases. (See Va. Constitution, Sec. 156, sub-sec. (**g**.), R., 48; Commission's Notice of July 31, 1906—part of "Ex. 5" with Appellants' Answer to Rule, R., 121; and concluding clauses of paragraphs 1, 2, 3, 4 and 6 of the Commission's order of April 27, 1907.—part of "Ex. 5" with said Answer to the Rule herein, R., 128-131.)

Should the company be dissatisfied with any decision of the Supreme Court of Appeals of the State, on any appeal from the Commission, it, of course, has its further appeal to this Honorable Supreme Court of the United States on any Federal question involved.

Notwithstanding these liberal and ample provisions for appeal (from orders of the Commission prescribing regulations) which had already been fully approved by the Supreme Court of Appeals of the State, and often availed of by railroad companies, including some of the Appellees here,—see:

Atlantic Coast Line and others (including most of the present Appellees themselves in these Passenger Rate Cases) vs. Commonwealth, 102 Va., 599 (involving demurrage charges);

Norfolk, &c., Co. vs. Commonwealth, 103 Va., 289 (involving charges for weighing and switch-service);

Newport News, &c., Co. vs. Hampton, &c., Co., 102 Va., 847 (involving regulations prescribed for establishing and operating a railroad crossing);

Standard Oil Co. vs. Commonwealth, 104 Va., 683 (involving a fine imposed by the Commission);

N. & W. R. Co. vs. Tidewater R. Co., 105 Va., 130 (involving regulations prescribed for establishing and operating railroad crossing);

Ches. & Ohio vs. Commonwealth, 105 Va., 297 (involving order requiring erection of a bridge);

Commonwealth vs. Atl. Coast Line, 106 Va., 61 (involving a judgment of the Commission declaring unconstitutional a Statute prescribing passenger rates);—

Notwithstanding the fact that the Constitution, Statutes, and repeated court decisions of the State had declared and held that the Corporation Commission of Virginia is a judicial court of record;—

Notwithstanding the fact that no State court has jurisdiction to **enjoin** the Commission,—a co-ordinate court of record;—

Notwithstanding the fact that the Appellee company had been given, and **had availed itself of**, the fullest opportunity to be heard in the proceedings before the Commission;—

Notwithstanding that it did not claim such hearing to have been incomplete in any respect, and did not intimate that there was any single question of law or fact on which it desired to, or could, be heard in the Federal Court which it was not given the absolute right to be heard upon, or was not actually heard fully upon, in the proceedings before the Commission,—having absolutely no new question of law or fact to allege in its behalf;

Notwithstanding all these things, the Appellee company refused either to obey the order of the Commission or to appeal therefrom; but, on May 15, 1907, brought suit in the Circuit Court of the United States for the Eastern District of Virginia to **enjoin** the Commission from enforcing its said order of April 27, 1907, or taking any further steps therein.

This suit was based on the following claims (See Bill of Complaint, R., 2-20):

> **1st. That the Virginia Corporation Commission had erred in holding the rate in question to be not less than reasonable;**
>
> **2nd. That the proceedings of the Commission in which this decision was reached, did not amount to due process of law;**
>
> **3rd. That to require the judicial question of the reasonableness of a rate to be passed upon by a special court, organized differently from the ordinary courts, would deprive the companies affected of the equal protection of the laws;**
>
> **4th. That the Commission could not act judicially because it is clothed also with legislative and executive powers;**
>
> **5th. That the State had bound itself not to regulate rates except under circumstances which do not now exist, and therefore the act of the Commission impaired the obligation of the contract between the State and the company; and**
>
> **6th. That, inasmuch as inter-state rates are built upon intra-state rates, any regulation of the latter by the State is a regulation of inter-state commerce, and void.**

On the **ex parte** application of the Appellee Company in this suit, the Honorable Judge Jeter C. Pritchard, of said Circuit Court, on May 15, 1907, entered a **restraining order,** enjoining the members of the Commission and their Clerk from further proceeding in the matter until the motion for an injunction **pendente lite** be heard, and requiring them to appear before him in Asheville, North Carolina, on June 27, 1907, to show cause why such **injunction** be not granted to the same effect. (R., 62-64.)

Counsel for the defendants (Appellants), who denied the jurisdiction of the court in the cause, entered a special and limited appearance for them at June Rules, 1907,—

> "For the purpose of objecting to the jurisdiction of this court to entertain said cause, or to make any order therein against the said defendants, or any of them, and for that purpose alone." (R., 167.)

On June 27, 1907, the defendants (Appellants), under said special appearance, filed their joint and separate Answer to said Rule, in which they denied the jurisdiction of the court on the following grounds, among others (R., 67-80):

> (1) That the defendants had no interest, as individuals, in the subject matter of the suit, and that the Virginia State Corporation Commission (as members of which alone they were sued), had no power to sue or be sued in any court;
>
> (2) That the suit, in substance and effect, was a suit against the State of Virginia, in violation of the Eleventh Amendment of the Federal Constitution;
>
> (3) That the State Corporation Commission of Virginia is a judicial court of record of that State, and that the object of this suit was to obtain an injunction to stay the proceedings of said State court, in violation of Section 720 of the Revised Statutes of the United States;
>
> (4) That the orders of the Commission, when made, are only enforceable—not by proceedings prosecuted by the Commission before some other tribunal, but—by the Commission itself, sitting as a judicial court, and issuing its own executive process upon a Rule issued by it, sua sponte, (or upon motion), requiring an offending company to show cause, if any it can, before the Commission itself, sitting as a court, why it should not be fined for violation of such an order; and that the object of this suit was to enjoin this State court from issuing such Rule or taking other proceedings thereon, in violation of said Section 720 of the Revised Statutes of the United States;

(5) That the question of the reasonableness of the rates complained of had already been judicially tried and decided by a regular court of record of the State, in proceedings by due process of law, to which the plaintiff company in this cause was a party, in which it had fully participated, and from which it had not appealed, and therefore said Circuit Court of the United States was without jurisdiction to re-inquire into the same matter;

(6) That the order sought to be enjoined could not become effective unless and until it shall have been published four times according to law, and that if the making of that order (after considering and passing upon its reasonableness) be not a judicial act, the enjoining of which is forbidden by said Section 720 of the Revised Statutes, then it was a legislative act which said Circuit Court was without jurisdiction to enjoin;

(7) That, whether the rates fixed by the Commission's order, were confiscatory, or regulated inter-state commerce, or impaired the obligation of a contract, were indeed Federal questions, but were none the less triable by a State court, subject to final review by the United States Supreme Court; that not only could all of these defenses have been made, but each and every of them was actually made, by the company in the proceedings before the Commission, which judicially heard and decided them, as shown by the record of those proceedings which was filed as an exhibit with said Answer of the defendants to the Rule.

The cause being heard on the Rule and Answer thereto, and a stipulation of counsel intended to avoid the necessity of introducing the enormous mass of testimony on the merits, the Judge, on July 10, 1907, overruled the objection to the court's jurisdiction and granted an **injunction pendente lite**, as prayed for in the Bill. (R., 173-177.)

Thereupon, at August Rules, 1907, the defendant Judge Robert R. Prentis (who, having succeeded Judge Crump as Chairman of the Commission, had been substituted for him as one of the defendants herein), filed his demurrer, based upon substantially the same grounds as those supporting said Answer to the Rule (R., 180); and the defendants Stuart, Willard and Wilson filed their joint and separate plea, setting up specifically that the Commission **is a court** within the purview of Section 720 of the United States Revised Statutes forbidding its proceedings from being enjoined (R.,181-184); and, on September 10, 1907, by leave of court, all four of said defendants filed their joint and separate plea of **res adjudicata.** (R., 190, 191-3.)

On motion of the complainant company, this demurrer and these two pleas were set down to be argued, and thereupon,

On December 26, 1907, the court overruled the demurrer and both pleas; and, the defendants declining to answer further, a final decree was on that day entered, taking the Bill **pro confesso,** perpetuating the injunction and decreeing costs against the defendants. (R., 194-6.)

At the same term, the petition for appeal, accompanied with an assignment of errors, was presented to the court, and the appeal allowed thereon from said final decree, upon which appeal this cause is now before this court. (R., 198-203.)

The errors assigned are, briefly, as follows:

(1) The lack of jurisdiction in the lower court;

(2) The sustaining of complainant's (Appellee's), claim that the constitutional and statutory provisions of the State involved, are "in contravention of the Constitution of the United States";

(3) The holding that the "law," of which the order of the Commission consisted, was "in contravention of the Constitution of the United States";

(4) The overruling of the demurrer aforesaid;

(5) The overruling of the said plea filed at

August Rules, that the Commission was a "court of the State of Virginia;

(6) The overruling of the said plea of res adjudicata; and

(7) The entering of a final decree for the complainant (Appellee), instead of for the defendants (Appellants).

Chapter III.

CLAIMS OF THE CARRIERS.

The Carriers contend, in support of their case:

(1) That any regulation, by whatsoever tribunal, of the intra-state business of the Carriers, necessarily results in a regulation of its "**inter-state commerce**" and is, therefore, beyond the power of the State;

(2) That for Virginia to regulate the rates in question would be to "**impair the obligation of a contract,**" which she is alleged to have made with certain of the Carriers many years ago;

(3) That the rates prescribed by the Virginia Commission, are unreasonably low and actually **confiscatory**;

(4) That the attempt to confer upon the Virginia Corporation Commission, legislative, executive and judicial powers, is void and of no effect, because such a combination of powers is not a "**republican form of Government**";

(5) That the proceedings before the Virginia State Corporation Commission, as prescribed by the Constitution and laws of that State, do not amount to "**due process of law**";

(6) That to subject the Common Carrier to the jurisdiction of a judicial tribunal, essentially different in its character from those which have jurisdiction over other classes of business and the citizens generally, is to deprive the Carriers of the "**Equal protection of the Laws**";

(7) That under the Virginia law the Carriers would be **denied access to the Federal Courts** on matters involving Federal rights and questions.

These several contentions will be discussed consecutively in separate Chapters.

Chapter IV.

REGULATIONS OF INTER-STATE COMMERCE.

I.

(A.)

It is contended that inter-state rates are "built up" on intra-state rates, and that, therefore any regulation of intra-state rates is **necessarily** a regulation of inter-state rates, which is forbidden altogether to the States.

A similar contention was first advanced thirty odd years ago, in **Munn vs. Illinois,** 94 U. S. 119 & 135; but it was overruled, the court saying, as it had done in the case of **State Tax on Railroad Gross Receipts,** 15 Wall 293,

> **"it is not everything that affects commerce, that amounts to a regulation of it, within the meaning of the Constitution."**

The Munn case, it is true was not the case of a railroad; but, about the same time, the same contention was put forward in a railroad case—to-wit: **Chicago &c. Co. vs. Iowa,** 94 U. S. 160 & 163—and was again expressly overruled.

Again the point was urged, and again overruled in **Peik vs. Chicago &c. Co.,** 94 U. S. 170, 174, 177-8.

And, in the **Railroad Commission cases,** 116 U. S. 323 & 334-5, the point was again suggested, but promptly overruled, the court saying:

> **"It [the State] may, beyond all question, by the settled rule of decision in this court, regulate freights and fares, for business done exclusively within the State."**

In the first three of these cases, it would seem that the regulation in question was designed to apply, not only to commerce wholly intra-state, but also to the intra-state portion of an inter-state shipment, and it was to the latter only, and not to **wholly** intra-state commerce that the language of the court, in those three cases, was addressed which refers to the right of the State to regulate only until Congress acts; as was afterwards pointed out by Mr. Justice Miller in delivering the opinion of the Court in **Wabash &c. Railway Co. vs. Illinois,** 118 U. S. 566 & seq., in which, while overruling the **dicta** of the former cases as to the right of a State to regulate rates on the intra-state portion of an inter-state route, the court said:

> **"If the Illinois Statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it valid."**

Wabash &c. Co. vs. Illinois, 118 U. S. 564.

See also **Dow vs. Beidelman,** 125 U. S. 689.

In this last named case, the right of the State to regulate intra-state passenger rates was re-iterated; as was also done as regards freight rates in **Chicago &c. Ry. Co. vs. Minnesota,** 134 U. S. 418, in which Mr. Justice Miller, summing up the propositions of law involved, which might be regarded as fully settled, stated, as the first one:

> **"In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage."**

Chicago &c. Ry. vs. Minn., 134 U. S., 459.

A regulation by the State of Michigan fixing intra-state passenger rates was upheld in **Chicago &c. Ry. Co. vs. Wellman,** 143 U. S. 339.

In **Reagan vs. Farmers Loan & Trust Co.**, 154 U. S. 362, the Railroad Commission of Texas and certain freight rates prescribed by it, were attacked, on the ground, among others, that,

> **"the rates on inter-state business would be injuriously affected to an equal amount by reason of the reduction of rates on business within the State";**

but the court, while expressly noting this contention in stating the case, wholly ignored it as a ground for its decision, entering into a laborious and detailed discussion of the reasonableness of the rate prescribed by the State, as the sole ground on which it could be attacked, as the court also did in the later cases of **Smyth vs. Ames**, 169 U. S. 466, **Chicago &c. Ry. vs. Tompkins**, 176 U. S. 172, and **Minneapolis &c. Ry. vs. Minnesota**, 186 U. S. 257. In the Tompkins case, **supra** the court, not satisfied with its own exhaustive inquiry into the reasonableness of the rate, sent the case back with instructions that it be referred to a special master for further investigation into the same subject.

Now, to what purpose was all this done, if it be true that the State had no right to regulate intra-state rates at all, because of their indirect, and reflex, effect upon inter-state rates?

The State is not merely prohibited from **unreasonably** regulating inter-state rates, but from regulating them at **all**. If, therefore, an **unreasonable** intra-state rate is void because of its effect upon inter-state rates, then, even a **reasonable** intra-state rate would, for the same reason, be equally void. Hence the reasonableness or unreasonableness of a State rate would be wholly immaterial, seeing that one is just as much a regulation of inter-state commerce as the other; but the uniform decisions of this court, ever since the subject of governmental regulation first came before it, thirty odd years ago, wholly refute such a conclusion.

The question should, however, be regarded as formally, as well as finally, put at rest and conclusively settled by this Court, when it was again presented here in the case of **Louis-**

ville & Nashville R. R. Co. vs. Kentucky, in 1902, where it was earnestly contended that the "long and short haul" provision of the Kentucky Statute, necessarily affected the inter-state rates of the Appellant Company. This contention, the court said, "need not detain us long".

> "**It is plain**", said the Court, "**that the provision in question does not in terms embrace the case of inter-state traffic. It is restricted in its regulations to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another, by a corporation of that State.**
>
> "**It may be, that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with inter-state commerce; that the interference with the commercial power of the general Government, to be unlawful, must be direct, and not the mere incidental effect of enforcing the police powers of a State.**"

L. & N. R. R. Co. vs. Ky., 183 U. S. 518 & 519.

Shortly after the above decision, it was decided (see **L. & N. R. R. vs. Eubank,** 184 U. S. 33) that a State law which **expressly** made an intra-state rate to depend upon an inter-state rate fixed by the carrier and, automatically, to vary with it, would be void. Even this distinction was made only by a divided court; but it in nowise affects the case now under consideration, unless it be, in the corollary that, if intra-state rates cannot be made to depend upon inter-state rates, because amounting to a regulation of the latter, then inter-state

rates cannot be made to depend upon intra-state rates for the same reason. In short, it is just as illegal for inter-state rates to be made to control intra-state rates, as for the latter to be made to control the former.

Mr. Justice Brewer, in his dissenting opinion in the Eubank case just referred to, while fully agreeing that the State could not regulate inter-state rates, insisted that to make an intra-state rate dependent upon an inter-state rate was to regulate the former and not the latter. And so it might be contended, in regard to making inter-state rates depend upon intra-state rates; but the Appellee companies here, insist, not only that inter-state rates may be based upon intra-state rates, but that for that reason the **State** must not be allowed to regulate intra-state rates at all! By this strange logic, any tribunal given supreme control over the rules of its own procedure, may acquire the like control over the rules of any other, and independent, tribunal, by merely deciding that its own rules shall be regulated by those of such other tribunal—**a reductio ad absurdum.**

If the contention of Appellees were sound, that intra-state rates **necessarily** control inter-state rates, then such would be equally true whether the intra-state rate be fixed by the State or by the carrier, and it would be just as unlawful that an inter-state rate, fixed by Federal authority, be defeated by an intra-state rate fixed by the carrier, as by one fixed by the State; yet, without question, there exists no other authority in this country for fixing intra-state rates, than the State or the carrier—another **reductio ad absurdum.**

(B.)

Whatever **influence** intra-state rates may exercise over inter-state rates, yet, that the latter are not **necessarily controlled** by the former, is abundantly shown by the fact, that they **are not controlled by them at all.** This fact is not only of common knowledge, but is abundantly shown by the reported cases before the Inter-state Commerce Commission.

The claim that inter-state rates are controlled by intra-state rates, is based upon the erroneous assumption that a through rate **cannot** exceed the sum of the locals, because,

it is assumed, the shipper or passenger would defeat the through rate by using successive local shipments or trips.

(1.)

A little reflection will show the **practical** impossibility of this.

(a) In the **first place**, the additional cost, delay and inconvenience of making successive local trips or shipments, rather than one through trip or shipment, would nearly always more than offset any difference between the through rate and the sum of the locals.

(b) In the **second place**, in order to make up an inter-state route wholly with successive intra-state routes, the stations would all have to be exactly on the State lines, which rarely ever happens, and need never happen. Hence every inter-state journey must contain an indivisible inter-state link, control over the rate of which gives control over the rate for the whole journey.

(c) In the **third place**, a practice of defeating the through rate by the successive use of the locals, even if practicable and actually indulged in, could readily be prevented by law.

As was held in **Morgan vs. Mo., Kan. & Tex. Ry.**, 12 I. C. Rep. 525, a specific through inter-state rate between two points is the only legal rate for the route, although the sum of the locals be less, and for the carrier or its agent to aid the shipper in availing himself of a combination of locals to evade paying the lawful through rate, would be to resort to one of the devices prohibited by the Act for regulating inter-state commerce. No reason exists why such a rule could not be put into statutory form and made to apply to passenger, as well as to freight, rates, and to the patron as well as to the carrier—if indeed the present statutes be not sufficient therefor.

If I obtain transportation for my goods at less than the lawful rate, by misrepresenting the point of origin or destination, I may and will be punished therefor. Why, then, is not the same true, or, if not, then why could not Congress most readily make it true, in cases where transportation for the **person** is obtained by mis-stating the point of destination and claiming to be taking successive local journeys to inter-

mediate points, rather than one through journey to the real destination?

In the case of **Davies vs. Williamson,** 21 New South Wales Law Rep. 124, decided in 1899, it was held that a passenger has no legal right to pay for a through trip by successively paying the local fares covering it, thereby defeating the through rate which was higher than the sum of the locals. And in 1903, in the well considered case of **Railway vs. Hinchcliffe,** 2 Kings Bench 32, the same doctrine was reiterated and firmly established in England.

It is manifestly, therefore, within the power of the United States to protect inter-state rates by preventing their defeat through an unlawful use of the intra-state rates; and the States surely will not be deprived of their constitutional right to regulate the intra-state rates within their respective territories, because the Federal Government might not choose to pass laws protecting inter-state rates from the fraudulent misuse of intra-state rates.

(2.)

As a **matter of fact,** however, nothing is commoner than for a through rate to be successfully maintained higher than the sum of the locals.

In the case of **Savannah &c. vs. Charleston &c. Co.,** 7 I. C. Rep. 601, it appeared that the inter-state rate established by the carrier from Savannah to Charleston was more than the aggregate of the local rates covering the route and established for the most part by the State. The carrier refused to reduce its inter-state rate to the sum of these locals; and the Inter-state Commerce Commission upheld the carrier in its refusal.

The same principle was reiterated and applied, in the later case of **R. R. Commission of Arkansas vs. St. Louis &c. R. R. Co.,** 12 I. C. Rep., 233 in which the Inter-state Commerce Commission refused to require the railroad to base its inter-state tariff upon the passenger rates which had been prescribed by the State Railroad Commission for intra-state rates and confirmed by this court in **Dow vs. Beidelman,** 125 U. S. 680.

To the effect also is the case of **Hope Cotton Oil &c. Co. vs. Tex. Pac. Ry.,** 12 I. C. Rep. 265 269, in which Mr. Commissioner Harlan delivering the opinion said:

> **"While a rate fixed by a State statute, or a State Commission, is naturally, and properly, entitled to respectful consideration, it has no greater sanctity, as applied to inter-state traffic, than a rate established by a railroad company, and we should not hesitate, upon proper evidence that a rate so established would be unjust, either to a carrier or to a shipper, to refuse to accept it as a basis for fixing an inter-state rate."**

In **Laning-Harris &c. Co. vs. Mo. Pacific Ry Co.** 13 I. C. Rep. 158, '9 the Commission speaks of the **"thousands" of cases** coming under their notice, where the through rate exceeds the sum of the locals.

How then can the Appellees sustain their contention that a through rate cannot be maintained in excess of the locals? We have pointed out, not only that there are both practical and legal reasons why it **can be done,** but that, as a matter of fact, and in "thousands" of instances, it is **actually done.** Yet, on this wholly erroneous assumption, the Appellees base their contention that a State should not be allowed to regulate intra-state commerce, because it thereby necessarily regulates inter-state business! We respectfully submit that neither the law nor the facts sustain such a contention, nor is it possibly consistent with our constitutional system of government which separates inter-state from intra-state commerce, relegating the former to the Federal, the latter, to the State Governments.

(3.)

The case of **Gulf &c. Co. vs. Texas,** 204 U. S. 403, confirms what we have said above. In that case, a car of corn was shipped from Dakota to Texarkana, Texas, where without being unloaded, it was reshipped to Goldthwaite, Texas. The court held that, under the particular circumstances of that case, the **inter**-state haul ended at Texarkana, and that the movement from that place to Goldthwaite was an **intra**-state movement, the rates for which were subject to regulation by the State of Texas. It is extremely probable that, but for the cheap intra-state rate established by the State from

Texarkana to Goldthwaite, the corn would have taken a continuous inter-state shipment from Dakota to Goldthwaite, and that the inter-state shipment of the corn only to Texarkana and thence by a distinct intra-state route to Goldthwaite was, to some extent, a defeat or over-reaching of the **inter**-state rate from Dakota to Goldthwaite: but, in the opinion of this court that was a legitimate result and had nothing to do with the validity of the Texas law prescribing an intra-state rate from Texarkana to Goldthwaite—the only question, as stated by Mr. Justice Brewer, delivering the unanimous opinion of the court, was whether, in the case of this particular shipment, the movement from Texarkana was a **separate** intra-tate shipment, or only a **portion of a continuous** inter-state shipment from Dakota. Holding it to have been the former, this court did not hesitate to say it was subject to the intra-state rates prescribed by the State of Texas; if the facts had shown the movement to have been only the conclusion of an inter-state shipment, as it might under other circumstances have been, then, of course, the intra-state rates would not have applied.

So, in the case now under consideration, the question is not whether some particular movement is an intra-state movement, or a link in a larger inter-state movement, but, whether the State of Virginia may prescribe and enforce reasonable rates for a **conceded** intra-state haul. The Texarkana case just cited is abundant authority for an affirmative answer to this question, even if there were no other.

II.

But should it be contended that, while the injurious effect of a State-made rate upon inter-state traffic would not suffice to deprive the State of **all** power over intra-state rates, yet it would **go to show that the intra-state rate in question is an unreasonable one,** then we reply as follows:

(1)

If the State has any right to make intra-state rates at all, then such appropriate judicial body as it may provide, has the right to determine—subject to a right of appeal to this

court—whether a given rate be reasonable or not; and no mere error in the State court's decision of that question will justify a subordinate Federal court in **enjoining** it. The question here is one of jurisdiction, not of error; and, if the State Corporation Commission of Virginia be in fact a **judicial court**—as the Constitution and Statutes of the State, the decisions of the Commission itself, and the repeated decisions of the Supreme Court of Appeals of that State, have expressly and repeatedly declared—then, the Circuit Court of the United States, for the Eastern District of Virginia, was wholly without jurisdiction to enjoin its proceedings, and the question of the reasonableness of the rate is not involved.

(2)

From what we have said, in part I of this chapter, it appears that intra-state rates do not necessarily control inter-state revenue, and if they should do so, the fault lies, not with the State, but with Congress for permitting it, instead of prohibiting, under appropriate penalties, persons from using intra-state rates for any part of an inter-state movement.

If, therefore, intra-state rates do not **necessarily** control inter-state rates, as we have shown to be the case, then the reasonableness of intra-state rates should not be tested, nor measured, by the effect which the carrier, or the Federal Government, may **permit** them to have on inter-state rates.

(3)

Finally, the question has long since been decided by this court, and is now **res adjudicata**; for, as was said by Mr. Justice Harlan, in **Smyth vs. Ames**, 169 U. S. 541, where the matter was elaborately considered:

> "**The reasonableness or unreasonableness of rates prescribed by a State, for the transportation of persons and property wholly within its limits, must be determined without reference to the inter-state business done by the carrier, or to the profit derived from it. The State cannot justify unreasonably low rates for domestic trans-**

portation considered alone, upon the ground that the carrier is earning large profits on its inter-state business, over which so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its Inter-state business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on inter-state business, nor the latter, the losses on domestic business. It is only rates for the transportation of persons or property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business."

What has been set forth in this Chapter, we respectfully submit, disposes fully of the question of "**Inter-state Commerce**", so far as it concerns this appeal.

Chapter V.

IMPAIRING THE OBLIGATION OF A CONTRACT.

In the Court below, some of the appellees insisted that the rates involved were illegal because, they alleged, the State of Virginia had bound itself by contract, so far as they were concerned, not to reduce their rates except under certain conditions which have not yet arisen, and that for the State to now make and enforce the rates in question would be to "**impair the obligation of its contract**".

That question, however, is **not involved in these appeals.**

These appellants believed and insisted that the lower Court was without jurisdiction in the premises.

After the Commission, as a judicial court, had already taken formal jurisdiction of the subject matter and the parties and after it (proceeding by due process of law) had spent nearly a year in hearing the evidence and considering the defenses formally made and pressed by the Railroads as parties to the proceedings, before rendering its decision, these appellants believed and insisted that the Railroads, if they deemed such decision erroneous, should have then appealed therefrom, in the manner provided by law, and not have ignored nor attempted to enjoin it in a subordinate Federal Court, which at most, had only a concurrent jurisdiction on the Federal questions involved.

Every objection to the rates, on the merits, which was advanced by the Railroads in the Federal Court—including among others, the alleged impairment of the "obligation of a contract", and the alleged "unreasonableness" of the rates—having already been expressly and distinctly made and pressed by the Railroads before the Commission, and having already been elaborately heard, maturely considered and expressly decided by that Court, these appellants believed and insisted that all those matters were **res adjudicatae,** unless appealed from, and were not legitimate subjects for re-investi-

gation by another and independent tribunal having only concurrent jurisdiction on the Federal questions involved.

Believing and insisting upon these things, these appellants respectfully declined to put in any defense **on the merits,** in the Federal Circuit Court below, and refrained (as they were advised that they, under the circumstances, should do) from offering any evidence, in that court, to show the reasonableness of the rates prescribed by the Commission, or the existence of facts under which, (even according to the terms of the alleged contracts) the State had the right to reduce or regulate the rates of the Railroad Companies—on both of which matters the Railroads had already been fully and elaborately heard in the State tribunal, with ample right of appeal as aforesaid; and these appellants accordingly rested their defense in the said Circuit Court upon the lack of jurisdiction of that Court, and the plea of **res adjudicata.**

The Circuit Court, however, overruled all these defenses of these appellants, and taking the Bills for confessed, granted the prayers thereof, in the respective causes, without any hearing upon the merits.

Thus, the lower Court not having heard the cases upon their merits, this Court, of course, will not undertake to do so.

In each of the several bills, it is alleged that the rates in question are unreasonably low and **confiscatory.** All of these Bills having, under the circumstances aforesaid, been taken for confessed, it follows that, if this Court should overrule both the defenses of the appellants, involving the questions of jurisdiction and **res adjudicata,** then the decision of the lower Court will be sustained, wholly irrespective of the question of the alleged impairment of the "obligation of a contract".

For this reason, it is manifest that the decision, or investigation, of that question is not involved in these appeals, and, therefore, the time of the Court will not be taken up in a discussion of it, involving, as it does, the consideration, among other things, of the following:

1st. Whether the statutes (constituting the alleged contracts) are general in their nature, and, therefore, subject to repeal or amendment;

2nd. Whether it was ultra vires for the Leg-

islature of the State to make an irrevocable contract, under which the police power of the State (for the reasonable regulation and control of the public highways, the protection of the people from extortion and the prevention of abuse of public franchises) is bartered away;

3rd. Whether the language of the statute in question, does in fact amount to any such contract as that alleged by the Railroads;

4th. Whether the existing facts are such that, (even under the terms of the alleged contracts) the State is precluded from regulating and reducing the rates—on which point, there is no evidence in the record, and nothing upon which to base a decision except the naked allegations of the Bills;

5th. Whether the Appellee Companies which are the successors to, or purchasers from, the original companies with which the alleged contracts were made, are entitled to any of the benefits of those alleged contracts.

In view of the great intrinsic importance, and far-reaching effect, of some of these questions, it is obviously undesirable that, for their final decision by this Court, they should only be submitted incidentally and in a cause where their determination is not necessary to a decision of the case.

For the foregoing reasons, none of these questions will be discussed here (however interesting they may be in themselves), seeing that, so far as these appeals are concerned, it is wholly immaterial whether the alleged binding contracts with the State do, or do not, exist.

Chapter VI.

UNREASONABLE AND CONFISCATORY RATES.

It is insisted by the appellees that the passenger rates involved in these appeals, and which were prescribed by the Virginia State Corporation Commission, are unreasonably low and **actually confiscatory**.

For the purposes of these appeals, but only those purposes, this claim is conceded by the appellants.

The issue here, is not the validity or invalidity of any particular rate—which, at best, is an ephemeral matter, seeing that both the expediency and the reasonableness of a given rate are constantly varying from time to time; but the **real issue** at stake in these appeals is **the validity of the Virginia State Corporation Commission**, a tribunal created by the fundamental law of that State, in a most earnest and painstaking effort to devise governmental machinery suitable and adequate for the proper and efficient exercise of the conceded power, and the effective performance of the vitally important duty, of the State to regulate the great public service corporations which wield such vast power over every branch of modern business, while, at the same time, sacredly observing, and adequately protecting, every property right of the carrier, and maintaining faithfully, in spirit and in substance, every guarantee afforded it in the Federal Constitution.

The issue here involves the momentous question (whose answer by this august tribunal will be far-reaching and enduring) of whether it be **possible** for a State to make **any effective use** of that conceded power, of regulating its public service corporations in respect of those matters which are confided solely to the State governments, or whether "due process of law", in the performance of this important function of government, can only be administered by machinery devised when present conditions were not dreamed of, and which is so cumbersome and inadequate as to be unworkable

for all practical purposes, in the actual business of State regulation of public service corporations.

In an effort to provide suitable machinery for the exercise, both justly and efficiently, of this important function, the State Corporation Commission of Virginia has been expressly created by the laws, and declared by the highest Court of that State to be, a **judicial court of record.** Its structure and operation, under the State Constitution, involves no **novelty nor change in the substantive law, but only in the machinery for its administration; and** the sole real issue in these appeals is whether this new Court is a **valid institution,** whose proceedings afford "due process" and "equal protection," and not whether some particular judgment, decree or order of it is erroneous.

> **"The denial of a hearing cannot be established by proving that the decision was wrong." Chin Yow vs. U. S., 208 U. S. 13.**

For these reasons, the appellants, for the purposes of these appeals, but for those purposes only, do not dispute the claim of appellees that the rates in question are unreasonably low or are actually confiscatory.

Chapter VII.

REPUBLICAN FORM OF GOVERNMENT.

The State Corporation Commission of Virginia having been not only authorized and provided for, but specifically constructed in all of its details of organization and procedure, by the State Constitution, it cannot, of course, be violative of **that** instrument. See Virginia Constitution 1902, Sections 155 and 156—(R., 83-90).

On the assumption, however, (of which see **post** p. 314 et seq), that the prescribing of a rate is a legislative function, the determination of its reasonableness, a judicial, and its enforcement, an executive, function, this Commission is attacked as an invalid tribunal, which (irrespective of the details of its procedure, and of the rights which are subject to its jurisdiction) cannot legally exist under the Federal Constitution, because, as it is charged, it is not a "**republican form of government**".

Concerning this contention, we respectfully submit the following considerations and authorities:

Such a combination of legislative, judicial and executive powers in one body or tribunal has nothing whatever to do with the "form of government", as that term is used in the Federal Constitution, but is consistent alike with almost any "form of government".

Dealing with the subject in the **abstract**, we are not without either definitions from the most influential, or adjudications from the most authoritative, sources.

Bouvier defines a republican government as a "government of the people"—see 2 Bouv. Law Dict. "Republican Government".

A very popular definition of a republican government is that given by **Abraham Lincoln** in his celebrated Gettysburg speech:

> "**A government of the people, by the people and for the people.**"

In defining a republican government, **Judge Cooley** says:

> "**By republican government is understood the government by representatives chosen by the people; and it contrasts on one side with a democracy in which the people or community, as an organized whole, wield sovereign powers of government, and, on the other, with the rule of one man as king, emperor, czar or sultan, or with that of one class of men, as an aristocracy**".
>
> **Cooley's Prin. Const. Law, 191-5.**

This Honorable Court has, itself, undertaken on several occasions to define a republican government, in the abstract.

In 1793, in the celebrated case of **Chisholm vs. Georgia**, 2 Dallas 457, Mr. Justice Wilson said:

> "**My short definition of such a government is—one constructed on this principle, that the supreme power resides in the body of the people**".

Again, in 1891, Chief Justice Fuller, in a definition especially commended by Justice Miller in his Commentaries on the Constitution, p. 640-1,—said:

> "**By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reposed in representative bodies whose acts may be said to be those of the people themselves.**"
>
> **In re Duncan, 139 U. S. 461.**

As late as 1899, this Court apparently accepted as correct the statement that,

> **"The distinguishing feature of that [a republican] form of government, is the right of the people to choose their own officers for governmental administration."**
> **Taylor v. Beckham, 178 U. S. 578.**

In the light of these definitions, what has the extent to which the people may choose to commingle legislative and judicial functions in the organization of various tribunals to do with the "republican form" of this government?

But let us consider the question in its **concrete** form, and address ourselves to the inquiry as to what the framers of the Federal Constitution meant by the term "republican form of government".

While that expression received no formal definition in the Federal Constitution, yet we can safely say that, whatever other forms of government might be properly classed as "republican", certain it is that, within the understanding and meaning of the Convention of 1787, which framed the Federal Constitution, the forms of government then existing in the several States constituting the Union, as well as the form of government created by the Federal Constitution for the Union itself, were, at least, well established, and characteristic, types of "republican forms of government".

> **"The authority extends no further than to the guarantee of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. Since, therefore, as the existing republican forms are contained by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have the right to do so and to claim the Federal guarantee for the latter. The only restriction imposed on them is that they shall not ex-**

change republican, for anti-republican, constitutions."

James Madison in The Federalist, No. 43.

"The forms of the governments of the several States composing the Union, as they stood at the time of their admission, was the proper standard by which to determine whether any future change in any of them makes its form of government other than republican."

John C. Calhoun—Works, Vol. 6, p. 219.

"There is a rule, and it is the only rule, as I think, consistent with what must have been the intention of the Convention and of the people, and that is this: That every government is republican in point of form which corresponds to the government in existence when the Constitution was adopted."

Reverdy Johnson—Speech in U. S. Senate, Dec. 14th, 1867.

"It is true that the United States guarantees to every State a republican form of government. * * * The guarantee is of a republican form of government. No particular government is designated as republican, neither is the exact form, to be guaranteed, in any manner especially designated. * * * All the States had governments when the Constitution was adopted. * * * These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus, we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution."

Minor v. Happersett, 21 Wall. 162.

If, then, the forms of State governments existing in 1787, when the Federal Constitution was adopted, may be regarded as authoritative types of what constituted a "republican form of government", it is manifest that the distinctive characteristic of "a republican form of government" does not consist of any **mere machinery** of such government for the ordinary administration of justice, because such machinery, as it existed in the thirteen original States at the time of the adoption of the Federal Constitution, was of almost infinite variety. That many of the most cherished rights of the people, even those which are sometimes rhetorically referred to as the "palladiums of our liberties," were not regarded by the framers of the Federal Constitution as essential elements in "a republican form of government," will be clearly seen from the following:

The first eight amendments to the Federal Constitution amount to a National Bill of Rights; yet it is well settled that none of them apply to State governments.

Brown vs. New Jersey, 175 U. S. 174.
West vs. Louisiana, 194 U. S. 260.
Jack vs. Kansas, 199 U. S 372.

After the adoption of the Fourteenth Amendment to the Federal Constitution, which in terms provided that,

> **"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States",**

it was contended that the effect of this enactment was to apply to the State governments the provisions of the first eight amendments to the Federal Constitution. But this court decided otherwise, and held that the inhibitions of the first eight Federal amendments were applicable only to the Federal government, and did not operate as restrictions upon the State governments.

Spies vs. Ills., 123 U. S. 166 & seq.
Maxwell vs. Dow, 176 U. S. 587 & seq.

Among some of the rights secured to the individual by

these first eight Federal Amendments are, freedom of religion, of speech and of the press; the right of the people peaceably to assemble and petition the government for redress of grievances; the right to bear arms; the right to trial by jury; the right not to be put twice in jeopardy of life or limb; the right not to be compelled to testify against oneself; and the right of an accused party to be confronted with the witnesses against him.

What provisions more essential to individual liberty and security could be suggested than these? And, yet, it is thoroughly well settled that none of these provisions is essential to constitute "a republican form of government". Not only has it been repeatedly held, as above pointed out, that, even under the Fourteenth Amendment, none of these restrictions on the Federal government applies to the State governments, but in numerous individual instances they have been held to be non-applicable, thus—

In **Walker vs. Sauvinet,** 92 U. S. 90, it was held that **trial by jury** in common law suits could be abolished by a State.

In **Hurtado vs. People,** 110 U. S. 516, it was held that **indictment by grand jury,** as a prerequisite for a prosecution for felony, could be abolished by a State.

In **West vs. Louisiana,** 194 U. S. 260, it was held that a State could abolish the law insuring to an accused person the **right to be confronted with witnesses against him.**

In **Minor vs. Happersett,** 21 Wall. 175, it was held that even the **right of suffrage** could be denied by a State to certain classes of its citizens, provided only that it did not amount to a general prohibition of popular election.

Even slavery, as pointed out by Reverdy Johnson, in his great speech of December 14, 1867, could be established by a State government without destroying the "republican form" of such government; and it is only by the provisions of the Thirteenth Federal Amendment, expressly prohibiting slavery, and not by virtue of the provisions of Article IV, Section 4, of the original Constitution, guaranteeing "a republican form of government", that slavery can no longer be established or maintained by State governments.

And it is by virtue, doubtless, of the Fourteenth Federal Amendment, and certainly not of the clause in reference to "a republican form of government", that a State may not to-day deprive any person of life, liberty or property, **without due process of law,** or deny to any person within its jurisdiction **equal protection of the laws.**

If, then, a State could abolish trial by jury, deny an accused person the right of being confronted with the witnesses against him, restrict suffrage, deny persons the equal protection of its laws, deprive them of their lives, liberty or property, without due process of law—even establish slavery—and yet still preserve the "republican form" of its government, is it not preposterous to say that such government would cease to be "republican in form" if it should merely venture to violate, in any degree, Montesquieu's dogma about the legislative, judicial and executive branches of government!

This maxim about keeping separate the three departments of government, while a most sound and important one within the scope of its proper meaning, is yet, like all general maxims of law, government or public policy, susceptible of a **reductio ad absurdum,** by being strictly, literally and unyieldingly applied in every possible situation.

The maxim itself, which is as old as Aristotle, was, in the latter part of the eighteenth century, revived and given new life by Montesquieu, in his celebrated work, **L'Esprit des Lois**—a work which was quite a fetish with the American statesmen of the Revolutionary period.

That governmental functions may be logically classified under three heads or departments—Legislative, Judicial and Executive—is undoubtedly true, although certain functions are of such an uncertain, or such a hybrid, nature that their correct classification is largely a matter of opinion, if not of mere taste. That a sound and wise policy should keep these three great departments as separate and distinct from each other as practicable is also true; but that any government ever existed, or ever will exist, wherein all three of them are kept absolutely separate and distinct in every particular is the merest delusion.

The British government was adopted by Montesquieu as his ideal. As has been said, his book is largely a eulogy of the

British Constitution; and yet, no one knew better than he that, under that Constitution and government, the King, the chief executive, participated in the enactment of the laws, and, in theory, presided in person over the Court of King's Bench; no one knew better than he that the great ministerial officers, who formed the so-called "government" for that kingdom, were exclusively composed of members of Parliament; and no one knew better than he that the House of Lords is a part both of the Legislative and of the Judicial branches of that government. Yet, it can truthfully be said that the separation of those three great departments, where reasonably practicable, is clearly recognized in and practiced by the British Constitution.

So far from the absolute separation of those three departments being an essential element in "a republican form of government", it is a fact that the government of no State in the Union has now, or ever had, such an absolute separation of powers, and the government of the United States itself is a notable example of a reasonable intermingling of all three departments, in various instances.

When the Federal Constitution was first framed by the Convention of 1789 and was sent forth to the several States for their ratification, so obvious was the combination, in numerous instances, of two or more of these three great governmental departments, as shown by the, then new, Constitution, that that fact was urged by the opponents of the Constitution as a fatal objection to the proposed Federal government. To meet this objection, James Madison and Alexander Hamilton, in a series of papers, now known as Numbers 47, 48, 49, 50 and 51, of the Federalist, set forth and elaborated the views above expressed, pointed out the utter impracticability of ever having the three departments absolutely separate, showed that no such absolute separation was ever intended to be advocated by Montesquieu, and that, as a matter of fact, every American State then existing had, more or less, combined those three departments in its government.

> **"If we look into the Constitutions of the several State, we find that, notwithstanding the emphatical, and, in some instances, the unqualified, terms in which this axiom has been laid down,**

there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.''

James Madison, The Federalist, No. 47.

''Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the Bill of Rights in many of our State Constitutions, the same mixture will be found provided for, and indeed required, in the same solemn intruments of government. * * * In Virginia the great mass of the appointive power is vested in the Legislature. Indeed, there is not a single Constitution of any State in the Union which does not practically embrace some acknowledgment of the maxim and, at the same time, some admixture of powers constituting an exception to it.''

Story on the Cons. Sec. 527.

''Even in the Constitution itself, we may trace repeated departures from the theoretical doctrine that the Legislative, Judicial and Executive powers should be kept separate and distinct.''

Mr. Justice Chase in Cooper vs. Telfair, 4 Dallas 18.

If we take the structure of the United States government itself, we find repeated instances of a combination of two or more of the three departments of government in one body. So far from this being denied, or doubted, it was so apparent and obvious that, as above stated, it was made one of the grounds of objection to the Federal Constitution by its opponents when it was before the people for ratification, while its friends, so far from denying it, justified it, as did Madison and Hamilton in their papers above referred to.

That the making of a treaty is a Legislative function cannot be denied, because the treaty, when made, becomes a part of the law of the country. And yet, the chief treaty-making power in the Federal government is the Executive. If, by

any method of reasoning, it should be claimed that the making of a treaty is an Executive function, then we have the U. S. Senate, a branch of the Legislative department, engaged in this "Executive function."

The President, as chief executive, participates in the enactment of all Federal statutes.

The Vice-President, who is as unquestionably a part of the Executive department as is the President, presides over the Senate, and, in case of a tie, has the casting vote.

The appointment to office has always been conceded to be an Executive function, and yet, this is participated in by the Senate in confirming or rejecting such appointments. If it be regarded as a Legislative function, then we have the chief executive participating in it, by making the appointments, subject to the Senate's confirmation.

In the trial of impeachments, the Senate, a branch of the Legislative department, acts directly as a Judicial Court.

Still other instances could be mentioned, if it were necessary, to show wherein the Federal Constitution frequently makes combinations of two or more of the three great classes of governmental functions in one officer or tribunal; and the same observation could be made of the State government of Virginia from the time of its inception to the present time. (See **post** p. 64175)

At the time when **New York** ratified the Federal Constitution, **the court of last resort in that State**, called the "Court for the Correction of Errors", was composed of the Chancellor, the three judges of the Supreme Court, and **twenty-four** (afterwards thirty-two) **members of the upper house of the State Legislature**; and this court remained the court of last resort until 1846.

It is true that Montesquieu says that the combination of these three departments in one body is of the essence of despotism, and that Mr. Jefferson is authority for the same statement; yet, as pointed out by Mr. Madison (a close student of Montesquieu, and the disciple and intimate friend of Jefferson), what those great philosophers referred to was the absorption by one department of **all** of the powers of the others—for instance, where one officer or tribunal undertook to exer-

cise all of the Legislative and Judicial powers of government; and that they did not have reference to a partial commingling of those powers, in view of the fact that such commingling was practically a necessity.

If, then, there can be some commingling of the powers of those three departments, who shall say to what extent such commingling may be? How much, and in what particulars, can there be such a commingling, and at what stage of such commingling does the government lose its "republican form" and become a despotism? Mr. Madison, in his dissertations on this subject in The Federalist, above referred to, fully answers this, by saying that this point is only reached when there is an absolute obliteration of the lines of distinction between these departments, and when the entire Judicial department shall have been merged in the Legislative department, and they in turn merged in the Executive department.

In most of the earlier State Constitutions there was contained the most absolute, unconditional and unqualified requirement of the absolute separation of these three departments of government. And yet, as pointed out by Mr. Madison, in the forty-seventh number of The Federalist, every one of these same Constitutions contained glaring violations of this maxim. It being conceded on all hands—both by its friends and its enemies—that the Federal Constitution contained numerous exceptions to the rule against the combination of the three departments of government, the framers of that great instrument did not commit the inconsisteney of inserting in that Constitution any declaration against the combination of those three departments, and thus it happens **that there is not a word in the Federal Constitution to-day, nor in any of its amendments, requiring the three departments of government to be kept separate, either in the Federal government or in any State government.**

In deference to the explanation, by Madison and Hamilton, of this celebrated maxim, about the separation of the three departments of government, and in recognition of the fact that **every Constitution in America contains and always has contained some violation of that principle,** the more recent State Constitutions, adopted in America since the days of the Revolution, have frequently, if not generally, modified the language of their declaration on this subject, and, instead of

providing absolutely and unconditionally that these three departments shall always be kept separate, say that, "**except as in this Constitution otherwise provided**", the said departments shall be kept separate.

The expression, "except as herein otherwise provided", which appears in the Third Article of the Virginia Constitution, does not refer merely to the Corporation Commission, as it is charged by appellees (Rec. pp. 4 and 51), but refers also to the numerous other instances of the commingling of the three departments of government which always have existed in the Constitutions of Virginia and of every other State; that same expression, "except as herein otherwise provided", has long been used in the Constitutions of other States, it is believed, in nearly, if not, all those Constitutions which have been adopted within the last fifty or seventy-five years.

It is true that an unwise, indiscriminate and excessive mingling of the respective characteristic functions of the three departments of government is a dangerous thing; and it is equally true that the extent to which they may be safely intermingled could not wisely be left to any one or more of those departments themselves.

As has been pointed out by the leading statesmen of this country since the days of the Revolution, including the celebrated authors of The Federalist themselves, a free republic is in more danger from the Legislative branch than from either the Executive or the Judicial. (Story on the Cons., Sec. 553 and seq.) For these reasons, the framers of American Constitutions have most wisely thought that, while the intermingling, to a certain extent, of the respective characteristic functions of the three departments of government is always necessary and, therefore, permissible, yet the particulars in which, and the extent to which such intermingling shall be done should be reserved to the people themselves in their primary capacity, and not left to any one or more of said departments of government. For this reason, it will be found that, while these several distinctive functions are today more or less intermingled in the government of every State in the Union, yet it is generally declared in the State Bills of Rights that such intermingling is, as a general thing, not desirable, and should be abstained from; and that it is

frequently provided, in the enacting parts of the State Constitutions, that there shall be no other intermingling of the functions, except that which is expressly provided for in the Constitution itself.

Referring to this universally existing, and absolutely necessary, partial admixture of the distinctive functions of the three departments of government, and particularly to the instances of such admixture in the Federal Constitution, Judge Story says:

> It was "made a special objection to the Constitution of the United States that, though it professed to be founded upon the division of the Legislative, Judicial and Executive departments, yet it was really chargeable with a departure from the doctrine, by accumulating in some instances the different powers in the same hands, and by a mixture of them in others; * * * The fact must be admitted that such an accumulation and mixture exists; but the conclusion that the system is, therefore, dangerous to the public liberty is wholly inadmissible. If the objection were well founded it would apply with equal, and, in some instances, with far greater, force to most of our State Constitutions; and thus the people would be proved their own worst enemies by embodying in their Constitutions the means of overthrowing their liberties. * * * At the present time the objection may not be felt as possessing much practical force, since experience has demonstrated the fallacy of the suggestions on which it was founded. But, as the objection may be revived; and as a perfect separation is occasionally found supported by the opinions of ingenious minds, dazzled by theory and extravagantly attached to the notion of simplicity in government, it may not be without use to recur to some of the reasons by which those illustrious statesmen who formed the Constitution, while they admitted the general truth of the maxim, endeavored to

prove that a rigid adherence to it in all cases would be subversive of the efficiency of the government and result in the destruction of public liberties."

Story on the Cons. Sec. 528.

From the foregoing it is manifest that nothing in the Federal Constitution, either expressly or by implication, requires a separation in State governments of the Legislative, Judicial and Executive functions; that, on the contrary, no such absolute separation exists in this country, or, it is believed, in any other country; that the maxim calling for the separation of those functions is subject to many exceptions in the Constitution of the United States, and in the Constitutions of every State in the Union; and that the degree to which that maxim may be departed from is left entirely to the people of the several States in the forming of their respective State Constitutions, provided only that they do not go to the extent of absolutely obliterating the line of demarkation and consolidating in one or more of those departments all of the functions of one, or both, of the other two.

But we are not left merely to our own reasoning on this point, because the exact question has already been repeatedly decided by this Honorable Court itself.

In 1798, in the notable case of **Calder vs. Bull**, one of the most frequently cited of all the decisions of this court, it appeared that the Legislature of the State of Connecticut had undertaken to set aside the judgment, and award a new trial in a private litigation, which had been concluded in the courts of that State. This action of the Connecticut Legislature was attacked in this court, and, among other things, it was claimed to be invalid because it was a Legislative invasion of the Judiciary department of government. No one denied that this was true, but the court held that, under the Constitution of Connecticut, the Legislature of that State could perform Judicial functions, and that there was nothing in the Federal Constitution with which such a state of affairs conflicted. The Legislature of Connecticut, said Mr. Justice Patterson, in that case,

> **"acted in a double capacity, as a House of Legislation with undefined authority, and as a Court of Judicature in certain exigencies."**
> **Calder vs. Bull, 3 Dallas 395.**

In pointing out that this combination of Legislature and Court in one body, while unusual in American States, was not in violation of any provision of the Federal Constitution, Mr. Justice Iredell, in the same case, referred to the fact that the House of Lords in England is the supreme appellate court of that country; and Mr. Justice Cushing said that, although

> **"the act [of the Connecticut Legislature] is a judicial act, it is not touched by the Federal Constitution."**
> **Idem, p. 400-1.**

This same point was reiterated by the Supreme Court of the United States in 1829, while Chief Justice Marshall was on the bench, in the case of **Satterlee vs. Mathewson**, in which Mr. Justice Washington, delivering the opinion of the Court, said:

> **"There is nothing in the Constitution of the United States which forbids the Legislature of a State to exercise Judicial functions. * * * It may safely be affirmed that no case has ever been decided in this Court upon a writ of error to a State Court, which affords the slightest countenance to this objection."**
> **Satterlee vs. Mathewson, 2 Peters 413.**

In view of these distinct decisions, to say nothing of the foregoing reasoning and authorities, we submit that it cannot be doubted that no combination, by a State, of any two or more of the three classes of governmental functions, which does not amount to an absorption by one department of all of the powers of another, can affect the "republican form" of such State's government.

As this Court has said:

> "The guarantee is of a republican form of government. No particular government is designated as republican; neither is the exact form, to be guaranteed, in any manner especially designated."
>
> Minor vs. Happersett, 21 Wall. 175.

Or, to quote the language of Mr. Justice Brewer, speaking for the Court, in Brown vs. New Jersey:

> "The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."
>
> Brown vs. New Jersey, 175 U. S. 175.

See also:

> Reetz vs. Michigan, 188 U. S. 507;
> Carfer vs. Caldwell, 200 U. S. 297.

In conclusion of this subject, the following quotations from opinions of this Court, rendered in cases directly in point, it is believed will definitely and finally dispose of any objection to the Virginia Corporation Commission, on the ground that it is inconsistent with a "republican form of government."

> "Whether this authority was strictly legislative or judicial, according to the distribution of power in the State government, was a question rather for that government than for this court to determine. * * * It might seem advantageous to some of the States that the judicial and legislative authorities or functions of the government should be blended in the same body; and that the legislature should in all cases exercise powers similar to those now vested

in one branch of the British Parliament, and as in some specified instances in one of the houses of our own national legislature. Should such an organization be adopted by a State, whatever might be thought of its wisdom, where beyond the body politic of the State would exist any power to impugn its legitimacy?"

Baltimore, &c. R. Co. vs. Nesbit, 10 How. 399.

"It may be true that the general rule is that the determination of the territorial boundaries of a municipal corportion is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts, and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under Section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every State in this Union. And whenever the Supreme Court of a State holds that, under the true construction of its constitution and statutes, the courts of that State have jurisdiction over such matters, the Federal Courts can neither deny the correctness of this construction, nor repudiate its binding force as presenting anything in conflict with the Federal Constitution."

Forsyth vs. Hammond, 166 U. S. 519.

"Whether the legislative, judicial and executive powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exercise powers which, strictly speaking, pertain to other departments of government, is for the determination of the State."

Dreyer vs. Illinois, 187 U. S. 83-4.

But, entirely apart from the foregoing, it is submitted that no attack, based upon this clause of the Federal Constitution, can be made, **alone and separately,** upon the Virginia State Corporation Commission. Any objection, under this clause of the Constitution must, of necessity, go to the **entire** "form of government" now existing in Virginia—must strike at the **whole** structure of that government, and, if such objection be sustained, must uproot and overthrow the existing "form of government" **as a whole.** This provision of the Constitution constitutes no authority for the lopping off of merely one limb; it means that, if Virginia has not, at present, "a republican form of government", then her existing "form of government", **as a whole,** must be stricken down, and an entirely new government, which is of "a republican form", must be substituted for that which now exists.

Such a question must, of necessity, be one **solely** for the **political** department of the Federal government. In the nature of things, it is not a question for the Judiciary. And this is the view which this Honorable Court has announced upon the subject.

> "**The Fourth Section of the Fourth Article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government. * * * Under this Article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And, when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be**

questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and, as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Luther vs. Borden, 7 How. 42.

"It was long ago settled that the enforcement of this guarantee belonged to the political department."

Taylor vs. Beckham, 178 U. S. 578.

See, also, to the same effect, In re Duncan, 139 U. S. 461.

Chapter VIII.

DUE PROCESS OF LAW.

It is next insisted by the appellees, that the proceedings before the Virginia State Corporation Commission, in which the reasonableness and other judicial questions affecting the validity of the rates involved were passed upon, did not amount to "due process of law"—in fact, they insist that no tribunal vested with legislative, judicial and executive functions is, in the nature of things, capable of administering "**due process of law**".

In this chapter, these contentions will be discussed and replied to.

I.

ORIGIN.

The prohibition against depriving any person of his life, liberty or property, without "due process of law," is one of the oldest provisions in the law of English-speaking people. It is certainly as old as Magna Charta, because, as Lord Coke points out (2 Inst., 50), the term "law of the land", as used in the Great Charter, is equivalent to the phrase "due process of law".

Murray's Lessee vs. Hoboken Land Co., 18 How. 274.
Davidson vs. New Orleans, 96 U. S. 101.

By the Fifth Amendment of the Federal Constitution, this requirement of "due process of law" was placed upon the action of the Federal government; and by the Fourteenth Amendment, in 1866, the same requirement was placed upon the action of the State governments; but, while these two constitutional enactments were intended as restrictions upon different governments, yet the term "due process of law"

must undoubtedly receive the same interpretation in each Amendment.

In 1855, before the enactment of the Fourteenth Amendment, this Court had occasion to carefully consider and construe the meaning of the phrase "due process of law", as used in the Fifth Amendment. In the course of an elaborate opinion, discussing the question, the Court said:

> **"Though 'due process of law' generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet this is not universally true."**
>
> **Murray's Lessee vs. Hoboken Land Co.,** 18 How. 280.

Since the enactment of the Fourteenth Amendment, it is probable that this court has been called upon more frequently to construe and apply the requirement of "due process of law." as found in the Fourteenth Amendment, than any other provision in the Federal Constitution. As long ago as 1877, the court felt called upon to advert to the fact that that clause in the Fourteenth Amendment seemed to be "looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court"—**Davidson vs. New Orleans,** 96 U. S. 104—an observation which the court has had occasion to repeat with more or less emphasis several times since.

County of Mobile vs. Kimball, 102 U. S. 704.
Missouri, &c., Co. vs. Humes, 115 U. S. 520.
N. Y., &c., Co. vs. Bristol, 151 U. S. 570.
Fallbrook, &c., vs. Bradley, 164 U. S. 157.

II.

DEFINITION.

While it is true that the courts have wisely refrained from attempting any conclusively comprehensive definition of the

term "due process of law", leaving the limitations of that phrase to be worked out, as Justice Miller said, "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require"—Davidson vs. New Orleans, 96 U. S. 104—yet, so numerous have those cases now become that there is but little room left, at this day, for any difference of opinion as to what does, and what does not, constitute "due process of law."

It would seem that no citation of authority is needed to show that "due process of law" has reference, not to the organization and constitution of a tribunal, but only to its method (not merely its form) of procedure; because it is obvious that the most regularly organized judicial tribunal imaginable may proceed in a manner utterly at variance with "due process of law"—Roller vs. Holly, 176 U. S. 398-413; Dean vs. Nelson, 10 Wall. 172; Windsor vs. McVeigh, 3 Otto 277—while, on the other hand, a tribunal, which is organized and constituted in a most anomalous and extraordinary manner, may possibly conduct its proceedings in the strictest accordance with "due process of law."

See, for example:

Walker vs. Sauvinet, 92 U. S. 90, where there was a civil court **without a jury.**

Hurtado vs. People, 110 U. S. 516, where there was a criminal court **without a grand jury.**

In re Manning, 139 U. S. 504, where the court was conducted by a **de facto judge.**

III.

NOT NECESSARILY JUDICIAL PROCESS.

So far is this true, that it is not essential to "due process" that it be administered by a judicial tribunal at all, but **may be administered by** strictly **executive officers or tribunals** as well. In short, the essential elements of "due process" are only these: **Reasonable notice** and a **fair opportunity to be heard**—these being adequately afforded, the nature of the tribunal and the form of procedure may vary to suit the practical re-

quirements of the subject to be dealt with; for, as Mr. Justice Brewer said, in **Reetz vs. Michigan**, 188 U. S. 507:

> "**Due process is not necessarily judicial process.**"

> "**A most exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the Fifth Amendment, resulted in the unanimous decision of this Court that they do not necessarily imply a regular proceeding in a court of justice or after the manner of such courts.**"
>
> Davidson vs. New Orleans, 96 U. S. 102.
>
> Murray's Lessee vs. Hoboken Land Co., 18 How. 272.
>
> See also Ex Parte Wall, 107 U. S. 289.

> "**A precise definition has never been attempted. It does not always mean proceedings in court. Murray's Lessee v. Hoboken, 18 How. 272; McMillen v. Anderson, 95 U. S. 37. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case. Dent. v. West Virginia, 129 U. S. 114; Lent v. Tillson, 140 U. S. 316; Hagar v. Reclamation District, 111 U. S. 701; Iowa Central R. R. Co. v. Iowa, 160 U. S. 389.**"
>
> **Ballard vs. Hunter**, 204 U. S. 255.

In the case of **Wilson vs. North Carolina**, 169 U. S. 586, it was held that the Governor himself—the very embodiment and personification of the executive department—could, and, in that case, did administer "due process of law," to deprive Wilson of what, under the laws of North Carolina (accepted, pro hac vice, by this Court) was an important and valuable property right.

See also Hagar vs. Reclamation District, 111 U. S. 701.
Wurts vs. Hoagland, 114 U. S. 606, 615.
Bauman vs. Ross, 167 U. S. 590.

> "It must, under our Constitution, be lawfully done. But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding."
>
> McMillen vs. Anderson, 95 U. S. 41.

IV.

RULE TO SHOW CAUSE.

Nor is it inconsistent with "due process" that the proceeding is based upon a notice, in the nature of a **rule to show cause**, rather than upon the more formal and regular process or original writ of the ordinary courts.

> "There is here no provision for a technical 'citation,' so-called; but there is, in effect, provision for a rule upon the incumbent to show cause why he refuses to surrender his office and for service of this rule upon him. * * * He was to be told when and where he must make his answer. The law made it the duty of the court to require this return to be made within twenty-four hours, and it placed the burden of proof upon him. But it required that he should be called upon to present his case before the court could proceed to judgment. He had an opportunity to be heard before he could be condemned. This was 'process'; and when served, it was sufficient to bring the incumbent into court, and to place him within its jurisdiction."
>
> **Kennard vs. Louisiana**, 92 U. S. 482.
>
> See also Huling vs. Kaw Valley, &c., Co., 130 U. S. 564.
>
> Lent vs. Tilson, 140 U. S. 328.
>
> Paulsen vs. Portland, 149 U. S. 40.

"It is also equally evident, provided the form sanctioned by the State law gives notice and affords an opportunity to be heard, that the mere question of whether it was by motion or ordinary action, in no way rendered the proceeding not 'due process of law'."

Iowa, &c., Co. vs. Iowa, 160 U. S. 393.

See also Bellingham, &c., Co. vs. New Whatcom, 172 U. S. 318.

"The mere fact that the proceeding to hold it liable was by rule, does not conflict with 'due process' under the Fourteenth Amendment. * * * The argument, therefore, asks us to say that the Louisville & Nashville, in the proceeding in which it was duly served, and to which it responded, and as to which it had its day in court, was deprived of defenses which it never asserted, and that 'due process of law' was not administered to it because it was unheard in respect to matters concerning which it made no claim."

This, the court refused to say, although the Louisville and Nashville was **not even a formal party to the suit.**

Louisville & Nashville R. R. vs. Schmidt, 177 U. S. 238-9.

V.

APPEAL NOT NECESSARY.

That "due process of law" does not necessarily include **an appeal**, is also well settled.

Fallbrook, &c., vs. Bradley, 164 U. S. 169.

Reetz vs. Mich., 188 U. S. 508.

But, even if such were not true, **the Constitution and laws of Virginia provide** the most ample, prompt and efficient machinery, both for **an appeal** from any action of the Commission, and for a **suspension of the order appealed from pending the decision of such appeal.**

Virginia Constitution, 1902. Sec. 156. Sub-sections D, E, F and G (R. 87-89).

VI.

NOTICE AND HEARING THE ONLY ESSENTIALS.

We repeat the proposition, without fear of refutation, that the **only essential elements** of "due process of law" are **reasonable notice** and a **fair opportunity to be heard** before final action, affecting one's rights, is taken.

> "It is not to be supposed that * * * the amendment prescribing 'due process of law' is too vague and indefinite to operate as a practical restraint. * * * It must be, not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition—'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.'"
>
> **Hurtado vs. Cal.**, 110 U. S. 535.

> "It follows that, any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised, in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be 'due process of law'."
>
> **Idem**, page 537.

> "It is settled that, if provision is made for notice to, and hearing of, each proprietor, at some stage of the proceedings, * * * there is no taking of his property, without 'due process of law'."
>
> **Paulsen vs. Portland**, 149 U. S. 41.

> "A hearing before judgment, with full opportunity to present all the evidence and the argu-

ments which the party deems important, is all that can be adjudged vital."

Pittsburg, &c., vs. Backus, 154 U. S. 426. Quoted with approval in Hodge vs. Muscatine County, 196 U. S. 281.

"'Due process of law' is afforded where there is an opportunity to be heard, * * * and the Legislature of a State may provide that such hearing shall be conclusive, so far as the Federal Constitution is concerned."

Hibben vs. Smith, 191 U. S. 322.

"It is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the mode of procedure for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

Iowa, &c., Co. vs. Iowa, 160 U. S. 393.—Quoted with approval in Cincinnati, &c., Co. vs. Snell, 193 U. S. 37.

"It is no longer open to contention that the 'due process' clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in State courts, or regulate practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not to have been 'due process of law,' the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend."

L. & N., &c., vs. Schmidt, 177 U. S. 236.

VII.

OLD USAGE SUFFICIENT, BUT NOT ESSENTIAL.

In the notable case of **Murray's Lessee vs. Hoboken Land Company**, 18 How. 277, it was laid down, in a decision which has been often reaffirmed, that whatever is not inconsistent with some express provision of the Constitution, and **is consistent with "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country,"** was "due process of law".

The proceedings prescribed by law for the State Corporation Commission are clearly not inconsistent with any express provision of the Federal Constitution, and, as is pointed out later on (post p. 85), are **wholly consistent with the proceedings in England, "before the emigration of our ancestors", for the fixing of the rates and charges for inn-keepers, ferries, mills, and other occupations "affected with a public interest", and equally consistent also with proceedings for similar purposes, as they have existed for a hundred years in Virginia.**

VIII.

MERE NOVELTY IS IMMATERIAL.

But even if this were not true, and if the State Corporation Commission of Virginia, as now constituted, could find no counterpart nor analogy in the previous institutions of this country or of England, still that would be no reason why its procedure should not amount to "due process of law".

In the case of Hurtado vs. Cal., 110 U. S. 528, it was insisted that the effect of the decision above quoted, in Murray's Lessee vs. Hoboken, &c., Co., 18 How. 272, was to establish the proposition that the proceedings of no tribunal could amount to "due process of law" **unless** it pursued "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors", &c.:

but the learned and brilliant Justice Stanley Mathews, speaking for the court, repudiated such a claim, and said:

> "The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be 'due process of law' if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be 'due process of law.' * * * [To hold otherwise] would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."
>
> Hurtado vs. California, 110 U. S. 528.

Proceeding to develop the same idea, Mr. Justice Mathews says later on in the same opinion (page 530):

> "It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government. * * * There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and, as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.

> On the contrary, we should expect that the new and various experiences of our situation and system will mould and shape it into new and not less useful forms" (p. 531). "The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form." (p. 527).

> "The abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition."
> Duncan vs. Missouri, 152 U. S. 382-3.

Because, as stated by the same court,

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that Legislatures are ultimate guardians of the liberties and welfare of the people, in quite as great a degree as the courts."
> Missouri, &c., Co. vs. May, 194 U. S. 270.

[If this can be said of "Legislatures," a fortiori can it be truly said of State Constitutions, by one of which the Virginia State Corporation Commission was devised and established.]

> "This court has not failed to recognize the fact that the law is, to a great extent, a progressive science; that, in some of the States, methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people or to the liberty of the citizen, have been found to be no longer necessary. * * * While the cardinal principles of

> **justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and the Constitution of the United States, which is necessarily, and to a large extent, inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land."**
>
> **Holden vs. Hardy,** 169 U. S. 385 & seq.

From these repeated expressions of this Court (and others, to the same effect, which might be cited, if necessary), it is clear that **no mere novelty** in the organization or procedure of the Virginia State Corporation Commission should prejudice the constitutionality or validity of that important and carefully constructed tribunal, or of its decisions.

It is believed that no feature of that Commission is without its counterpart or analogue in other institutions of this country, which are of recognized and approved validity—see post p. 75, 77, 123—but, even if this were not true, we challenge with confidence the pointing out of any single essential of "due process of law" (as those essentials have been established by repeated adjudications), which the Corporation Commission of Virginia lacks, either in its organization or in its methods of procedure.

IX.

COMMONWEALTH IS ACTUAL PLAINTIFF.

In this connection the appellees say that, in the proceedings before the Virginia State Corporation Commission, for establishing a rate, there is **no plaintiff**, but that the Commission proceeds **sua sponte**, and is, as appellees claim, both plaintiff and judge, which is, they insist, inconsistent with "due process of law".

In response to this, we submit, **first**, that the point is not

sustained by the facts, because the statute itself provides for a plaintiff other than the Commission; and, **second**, that, even if it did not, yet the lack of a formal "plaintiff" would not deprive the proceedings of any essential characteristic of "due process of law".

In the Twenty-second Section of the Virginia Act of April 15th, 1903, of which a copy is filed with the answer of the defendants herein (Rec. p. 98), it is provided:

> "**That in all * * * proceedings * * * before the Commission * * * the Commonwealth shall be complainant, and the party against whom * * * the proceeding [is] instituted, shall be the defendant.**"

Accordingly, in the proceedings before the State Corporation Commission involved in these suits, the Commonwealth of Virginia **was** the party plaintiff; and, upon any appeal which might have been taken from the said order therein, of April 27th, 1907, by any company thereby affected, the express provision of Sub-section D, of Section 156, of the Virginia Constitution of 1902 (Rec. p. 87), requires that the Commonwealth be made the appellee. The fact that, in this particular case, the style of the suit is "Commonwealth, on the relation of the Corporation Commission," is wholly immaterial, in view of the fact that there is nothing in the law requiring such proceedings to be instituted by the Corporation Commission, but identically the same proceedings may be instituted by the Commonwealth at the relation of the Attorney-General, or on the relation of some individual.

While the proceedings may be started by the Commission **sua sponte**, yet they are not necessarily so, but may be, and, as a matter of fact, sometimes are, started on the initiative of an individual shipper or organization of shippers, or other patrons of the railroads.

From this, it will be seen that the argument of the appellees on this point is based upon an **erroneous assumption** that there is no formal "plaintiff" in the proceedings before the Commission.

SEE ALSO, POST P. 171. C.

X.

NO FORMAL PLAINTIFF IS ESSENTIAL.

But, even if there were no formal plaintiff named in said proceedings, yet that fact could not possibly deprive those proceedings of the character of "due process of law".

As said by Mr. Justice Curtis, in **Murray's Lessee vs. Hoboken Land Company (supra)**:

> **"Though 'due process of law' generally implies and includes actor, reus, judex, * * * yet this is not universally true."** 18 Howard, 277.

As has already been pointed out, "due process of law" can be, and often is, administered by purely executive tribunals, as was the case of **Murray's Lessee vs. Hoboken,** just mentioned, and as in numerous other instances hereinbefore cited. Of course, no such thing as a "plaintiff" could appear in any purely administrative or executive proceeding.

As also pointed out above, the only essentials of "due process of law" are, first, **reasonable notice,** and, second, an **opportunity to be heard before final action** is taken—a fact which has been repeated, almost ad nauseam, by the courts. This being true, what has the existence or non-existence of a technical or formal "plaintiff" to do with the question as to whether there has been "due process of law" or not?

In the case of **Wilson vs. North Carolina,** 169 U. S. 586, "due process of law" was held to have been administered by the Governor of North Carolina in a proceeding which consisted practically of a letter written by the Governor to Wilson, advising Wilson that, at a certain time and place, the Governor would hear anything that Wilson had to say as to why he should not be removed from his office, although such office, under the law of North Carolina, as it then stood, was held to be "property". Surely there was no formal "plaintiff" in that proceeding, and yet it was held to be "due process of law".

In numerous other cases, which will be cited later on, where "due process" is administered by executive and quasi-legisla-

tive bodies, there is no pretense of a technical "plaintiff".

A very common instance of a proceeding by "due process of law" in an ordinary judicial court, without the presence of a formal "plaintiff", is the case of proceedings in such tribunals for "**contempt**", in which the court, sua sponte, issues a rule against a party to show cause, if any he can, why he should not be fined or otherwise punished for contempt. In such a case there is no "plaintiff", unless the judge himself be regarded as such, and yet it is believed that no one has ever claimed that the absence of such a formal "plaintiff" deprives such a proceeding of the quality of "due process of law".

XI.

COMMISSION NOT JUDGE IN ITS OWN CASE.

But, then, it is suggested that the fact that the Commission must have, at least **tentatively, decided** upon the rate named in the notice or rule upon which the proceedings are based, before such notice or rule is entered, would of itself disqualify the Commission from hearing and deciding, by "due process of law", any objections which might be urged thereto, and would practically constitute the Commission the judge in its own case.

Answering these points in the reverse order, we respectfully submit that, so far from the Commission being constituted a **judge in its own case,** the members of such tribunal cannot be assumed to have any personal interest whatever in any such matter. The Constitution of the State expressly provides that no person, "while employed by, or holding any office in relation to, any transportation or transmission company, or while in any wise financially interested therein", shall be eligible to act as a member of the State Corporation Commission, at least one member of which "shall have the qualifications prescribed for Judges of the Supreme Court of Appeals" (Rec. p. 83). Each Commissioner is appointed by the Governor and confirmed by the Senate, his term of office being six years, the term of one Commissioner expiring every two years (Rec. p. 83). Surely these Commissioners cannot be assumed to have interests antagonistic to the railroad companies, any more than

could the Judges of the Supreme Court of Appeals, or any other court.

Of course, should it transpire that a Commissioner had some personal, or other improper, interest in any matter pending before the Commission, he would, for that reason, be unfit, and an improper person, to act as a member of the Commission in such matter, and, should he insist upon so acting, it would doubtless amount to a fraud, which would, of course, affect the proceedings exactly as if a judge in any ordinary court were guilty of similar conduct. But, in the absence of any intimation of such improper interest or bias in the Commissioners, that tribunal surely cannot be regarded as undertaking to act as judge in its own matters, simply because proceedings involving an investigation into the reasonableness of a rate or the consideration of any proposed regulation were initiated by the Commission **sua sponte**.

Again, the case of **proceedings for contempt** will be found analogous. In such cases, it has sometimes been suggested that the judge of the court against which the contempt is committed is, in fact, the "plaintiff," and, therefore, disqualified to hear the case.

Surely, if there were anything whatever in the point of the judge being necessarily the plaintiff in every proceeding initiated by the court sua sponte, it would seem to apply to such a case as this; because, if a judge, who, by the contempt, has possibly been subjected to personal outrage and insult, is not disqualified, by interest, from avenging and punishing the misconduct, and, in doing so, cannot be said to be acting as judge in his own case, then surely the mere suggestion by a Corporation Commission of a proposed rate or regulation, as a subject of consideration and judicial investigation as to its reasonableness, could not properly be regarded as disqualifying the members of that Commission from conducting such investigation, nor subject them to the charge of sitting as judges in their own case. And, yet, as has been often pointed out, a judge, in punishing for contempt, is not to be presumed as avenging his own wrong, nor as vindicating his personal dignity, but as maintaining the dignity and authority of the Commonwealth in its courts. Speaking on the subject, this Court, in a very recent case, said:

> "The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case."
> **United States vs. Shipp**, 203 U. S. 574.

In the particular proceedings involved in these cases now under consideration, it cannot even be said that the Commission itself "suggested" a rate of two cents a mile, as the subject of their judicial investigation. On the contrary, this rate had been "suggested" by the formal action of the General Assembly of Virginia at its regular session in March, 1906, at which the following joint resolution was adopted by both Houses:

> "Be it resolved by the House of Delegates (the Senate concurring), that this General Assembly recommend to the State Corporation Commission, and hereby request said Commission, as soon as practicable after the passage of this resolution, and in conformity with the powers conferred upon it by the Constitution and laws of this State, to fix and prescribe the maximum traveling rate of two cents per mile for the transportation of passengers by the transportation companies or corporations in this State operated by steam, when the distance to be traveled by any such passenger is as great as five miles."
>
> See Journal of Virginia House of Delegates, session of 1906, pages 713 and 828.

Thus it will be seen, that in this case, the Corporation Commission cannot be suspected of being influenced, even by the pride of authorship, in considering any objections which might have been urged to the suggested two cent rate; and, as a matter of fact, the Commission **did not**, after hearing the evidence, **fix a two cent rate** for **all** the railroads, but **classified the roads into four classes, prescribing for the several classes two cents, two cents and a half, three cents, and three cents and a half,**

respectively—a discrimination which they were authorized to make. See—

Chicago vs. Iowa, 94 U. S. 164.
Covington, &c., vs. Sanford, 164 U. S. 578.
Dow vs. Beidelman, 125 U. S. 680.
Ruggles vs. Ill., 108 U. S. 526.
Ill. Cent. vs. Ill., 108 U. S. 541.
L. & N. Ry. vs. Mct'hord, 183 U. S. 494.
Chicago, &c., vs. Wellman, 143 U. S. 339.

XII.

NO PREJUDGMENT OF CASE BY COMMISSION.

But we go further, and submit with confidence that, even if the Commission had, itself, originally suggested the two cent rate, and, regardless of how much thought or investigation they may have given to the subject before they issued the rule or notice of July 31st, 1906, yet their jurisdiction to hear, consider and pass upon objections which might be urged to such rate by the Railroad Companies, could not possibly have been destroyed.

Every point of law that could be urged, and every iota of testimony that could be adduced, is required by law to be made a part of the record of their proceedings; no conceivable defense or objection which the Railroad Companies could interpose in any court of law are they debarred from or embarrassed in, presenting in their defense in such proceedings before the Commission. If, from ignorance, inattention or prejudice on the part of any one or more members of the Commission, or for any other reason, their decision, upon the case so made up, is erroneous, then such decision, like that of any other nisi prius court, is reviewable, upon the whole record, by the Supreme Court of Appeals of the State—a tribunal which surely cannot in such case be charged with having prejudged it.

> **"From any action of the Commission prescribing rates * * * an appeal * * * may be taken by the corporation whose rates * * * are affected, or by any person deeming himself aggrieved by such action, or * * * by the Com-**

> **monwealth. * * * Such an appeal shall be of right. * * * All appeals from the Commission shall be to the Supreme Court of Appeals only.**"
> Va. Constitution, Article XII, Sec. 156, Subsec. d (Rec. p. 87).

In each of these cases now here pending the Honorable Judge of the Circuit Court for the Eastern District of Virginia issued a rule against the appellants here, requiring them to appear before him, at a given time and place, to show cause, if any they could, why an injunction should not be issued, as prayed for in the Bill—Rec. p. 63. Before the issuance of such Rule, the plaintiffs had appeared before the Judge and made an ex parte statement of their case to him, and he had so far considered the case so presented to him as to have granted a suspending order therein covering, for the period of its operation, the same matters sought to be covered by the injunction. This suspending order was issued to one of the principal departments of the State government of Virginia, tied up the hands of that entire department, and stopped it in the performance of a most important and far-reaching public act. It is inconceivable that the learned judge would have done this without having given very careful consideration to the case as presented to him, or without having come to the conclusion, upon such consideration, that the matter was, at least, of sufficient importance, and the right of the Commission to proceed sufficiently doubtful, to justify him in taking so serious a step in suspending the operation of an important branch of the State government.

Surely, such an act would require as much previous consideration, on the part of the honorable judge of the lower court, as the Corporation Commission can be presumed to have expended upon the question of the reasonableness of a particular rate, before issuing a Rule or notice to the Railroad Companies as the basis for a formal inquiry into the matter. And it is respectfully submitted, that the Commission can no more be regarded as having disqualified itself to try the issues upon such Rule or notice, because of the preliminary investigation which they gave, or might possibly have given, to the matter before issuing the Rule than could the honorable judge of the

court below be properly regarded as having disqualified himself from hearing and deciding upon the Rules issued by him in these cases, because of the consideration which he must of necessity have given the matter before deciding to issue such Rules—which it would be absurd for any one to suggest.

But, after all, neither the real, nor the supposed, bias of a judge can affect the question of the **jurisdiction** of the court.

That the mere preliminary consideration of the subject, and the suggestion of a rate as the basis of investigation, would not make it impossible for a commission to administer "due process of law" in hearing and deciding upon objections to that rate, has been, in effect, repeatedly decided by this court in the case of tribunals provided for the appraisement of land, for taxes, or for the apportionment of the costs of local improvements.

In the case of **Paulsen vs. Portland,** it appeared that the State law provided for a Commission to ascertain the amount of taxes to be borne by each property-holder for certain special local improvements, and provided for a hearing to be given to the property-holders by the Commission. There was no provision for any "plaintiff" in such proceeding, but the Commission instituted the proceeding sua sponte, heard all the evidence adduced, and decided what proportion of the taxes should be put upon each property-holder. The Commission published notice of the time and place of its meeting, in order that "all persons interested might appear and be heard in the matter of making the estimate". The court held that this proceeding was "due process of law," and binding upon the property-holders, unless reversed on appeal.

Paulsen vs. Portland, 149 U. S. 38.

The case of Pittsburg, &c., Co. vs. Backus was one in which there was a Board of Assessors appointed to assess railroad property for taxation. The Board was required to give due notice of the time and place of their sitting, and an opportunity to be heard before making their assessment, and there was no appeal provided from their decision. The court held that this also was "due process of law".

Pittsburg, &c., Co. vs. Backus, 154 U. S. 425.

In the case of Brooklyn, &c., Co. vs. New York, it appeared that the statutes of New York provided for a special Commission to assess the value of the Company's franchise, and that, **after the Commission had investigated the matter and decided tentatively upon an assessment or valuation of the property,** it should then summons the Company before the Commission to show cause, if any it could, against the proposed valuation. Under the law the decision of the Commission, after such hearing, could be reviewed by the Supreme Court of that State on certiorari. The Supreme Court of the United States held that this was "due process of law," saying:

> "**After making the valuation, the State board is required to give notice in writing to the owner of the franchise, stating the valuation, [which had been tentatively made by the Commission], and that, on a day specified, not less than twenty, nor more than thirty days thereafter, it will meet to hear and determine any complaint against such assessment, and this notice must be served at least ten days before the day fixed for the hearing. At the hearing, the owner may file a statement, under oath, specifying the respect in which the valuation is incorrect. Testimony may be taken and a full investigation had. Another section provides for a review of the assessment by writ of certiorari. * * * Surely, by this, 'due process of law' was secured.**"
>
> **Brooklyn, &c., Co. vs. New York,** 199 U. S. 51.

When the proceedings before the Virginia State Corporation Commission are tested by comparison with these proceedings, under the New York statute, which the Supreme Court of the United States, in the case just cited, held to be "due process of law," it will be seen that the proceedings before the Virginia Commission not only have every element specified by the court as constituting "due process of law", under the New York statute, but make very much more liberal, elaborate and comprehensive provision for the protection of the Company than the New York statute does.

Let us compare these two cases. The Board of Tax Commissioners in New York is certainly no more a judicial tribunal than is the State Corporation Commission of Virginia; its proceedings are characterized by nothing like the formality and liberal provisions for the protection of the company that characterize proceedings before the Virginia Commission. The New York Commission is required to actually make a valuation of its own before the company affected is heard on the subject at all, while, as hereinbefore pointed out, the Virginia Commission may act upon the initiative of the Commonwealth, or of any individual interested; and even where it acts upon its own initiative, the law leaves it entirely to the Commission as to what, if any, investigation of the subject it will make before calling on the Railroad Companies to show cause against any suggested rate or regulation. The finding of the New York Commission may be reviewed only by the extraordinary writ of **certiorari**; but, **from each and every finding of the Virginia Commission, the Company may take an appeal, as of right,** to the Supreme Court of Appeals. Under the writ of **certiorari,** only the regularity of the proceedings and the jurisdiction of the lower body may be considered; but, under the appeal given by the Virginia law, **the merits** of the controversy may be re-examined by the appellate court on a certificate of the evidence taken before the Commission. Furthermore, **pending an appeal from the Virginia Commission, the order appealed from may be suspended, so that no penalties may be incurred until the appeal is finally determined.**

See Va. Const., Sec. 156, Sub-sec. (e)—Rec. p. 87.

XIII.

NECESSITY FOR PROMPT ACTION.

A property-holder is just as much entitled to a hearing by "due process of law", upon the question of the correct valuation of his property for taxation, as is a carrier on the question of the reasonableness of a rate prescribed for it.

If it be suggested that the great importance of obtaining revenue for the government justifies a somewhat more summary proceeding, as "due process of law", in the assessment and collection of taxes, than in ordinary inquiries, we reply

that, if the government is to exercise at all its well-settled right and important duty of prescribing and regulating the rates of public service corporations, then the absolute necessity of employing governmental machinery capable of **prompter action** than the ordinary courts, and of resorting to **a more summary process than in ordinary controversies,** is even more obvious than in the case of the assessment of taxes.

As was said by Chief Justice Marshall, in McCulloch vs. Maryland:

> "**The government, which has the right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.**"
>
> **McCulloch vs. Maryland,** 4 Wheaton, 409-10.

It is no longer open to question in this country that a State has the right, **by some sort** of instrumentality, to prescribe and regulate the intra-state rates of railroads within its border. The very nature of railroad rates—especially freight rates—and the constantly varying circumstances and conditions upon which their reasonableness, propriety and expediency depend, render promptness of action, in any machinery for their regulation, one of the most important requirements; otherwise, the **whole occasion for, or justification of, a given rate will have passed away before it can be made effective.**

As was said by Mr. Justice (then Circuit Judge) Brewer, in the noted case of Chicago, &c., Co. vs. Dey:

> "**The reasonableness of a rate changes with the changed condition of circumstances. That which would be fair and reasonable to-day, six months or a year hence may be either too high or too low.**"
>
> **Chicago, &c., Co. vs. Dey,** 35 Fed. 875.

How futile, therefore, to hope for any practicable exercise of the rate-making power, with machinery in which the rate is prescribed by one tribunal, but cannot be made effective until its reasonableness shall have been tested, possibly one or two years afterwards, on entirely different evidence, and by another tribunal (probably belonging to an entirely different government)!

For these reasons, it is submitted that, as above stated, the occasion for speedy action, if not as great as that in the **collection** of taxes, is, in rate-making, surely as great as in the case of the **assessment** of property for taxation; but, even if it were not, yet, beyond doubt, the occasion calls for and justifies at least as prompt and summary proceedings as does the apportionment among the abutting property-holders of the expenses of a proposed, or executed, **local improvement.**

If, however, the proceedings before municipal councils and special boards, organized under the laws of various States, to **apportion the costs of local improvements** and to assign the due proportion thereof against the respective property-holders involved—a proceeding which the court has said, again and again, demands "due process of law"—be compared with the proceedings prescribed by law for the Virginia State Corporation Commission in determining a rate, it will be seen that every element which the courts have held sufficient to constitute "due process of law", in apportioning these costs of local improvements, not only exists in the proceedings before the Virginia Corporation Commission, but are therein **elaborately enlarged and perfected** for the additional protection of the company.

In addition to the authorities above cited, the following two cases are illustrative of what the courts have held to be sufficient "due process" in cases of local assessment, where, of course, the occasion for promptness of action is not comparable to that of rate-making.

The case of Hibben vs. Smith involved a local assessment in Indiana, where the law provided for an assessment to be made by a board constituted for that purpose, and for a hearing to be granted by that board to the property-owner, from which hearing no appeal or review was provided for. Yet the Supreme Court of the United States held the proceeding to be "due process of law", saying:

> "**Assuming the necessity of a hearing before an assessment can be made conclusive, the law may provide for that hearing by the body which levies the assessment, and, after such hearing, may make the decision of that body conclusive.** * * * **'Due process of law' is afforded where there is an opportunity to be heard before the body which is to make the assessment, and the Legislature of a State may provide that such hearing shall be conclusive, so far as the Federal Constitution is concerned.**"
>
> **Hibben vs. Smith,** 191 U. S. 321.

The case of **Fallbrook Irrigation District vs. Bradley,** 164 U. S. 167, was a similar case, involving not the assessment of taxes for ordinary governmental purposes, but the levying of a special assessment for special benefits, resulting from the irrigation services of a public service company, a matter that, so far as mere promptness of action is concerned, could well have awaited the proceedings of ordinary courts, but which could, as a matter of practical convenience and efficiency, be better handled in the manner provided. In this case also this Court expressed the same views as it did later on in Hibben vs. Smith (supra).

XIV.

ADMINISTERED BY LEGISLATIVE OR EXECUTIVE, AS WELL AS JUDICIAL, BODY.

In view of the repeated decisions of this Court on the subject of "due process of law," it is believed to be established beyond the possibility of refutation that the only essential elements therein are, **first,** that the tribunal must be created by **public authority and authorized to act in the premises; second,** that the party to be affected must have **reasonable notice** of the proceedings; and, **third,** that such party must have, of right, a fair **opportunity to be heard** before final action is taken affecting his rights.

It is submitted, therefore, with confidence, that, so far as the Federal Constitution is concerned, there is no intrinsic reason why "due process" cannot be administered as well by a **legislative body**—for example, a town council, as in Spring Valley, &c., vs. Schottler, 110 U. S. 354, or San Diego, &c., Co. vs. National City, 174 U. S. 753—or an **executive body**—for example, a special Commission, as in Paulsen vs. Portland, 149 U. S. 38; Hibben vs. Smith, 191 U. S. 321, or Brooklyn, &c., vs. New York, 199 U. S. 51—as it could be administered by a **judicial body**; and it is largely a matter of convenience and expediency (to be determined by the laws of the State) as to the character of tribunal employed.

But (it is insisted) the prescribing of a rate is a **legislative function**, while the determination of its reasonableness is a **judicial function**; therefore, the former cannot be performed by a **court**, nor the latter by any tribunal **other than a court**.

Let these several propositions be considered separately.

XV.

MAKING RATE ANALOGOUS TO INJUNCTION.

As stated in an earlier portion of this note, the aggregate functions of government are, indeed, logically divisible into the three great classes of Legislative, Judicial and Executive; and there are many specific functions so distinctively characteristic that there can be no dispute as to their proper classification. On the other hand, however, there are certain functions which are so interwoven and blended as to make it somewhat a matter of opinion and viewpoint, if not of mere taste or fancy, as to how they should be classified. Rate-making might, in some aspects, be regarded as one of these **hybrid functions**.

In the Water Company case, it appeared that the Constitution of California had empowered city councils and county Boards of Supervisors to prescribe rates for water companies. Speaking of that function, this Court said:

> "**Like every other tribunal established by the Legislature for such a purpose, their duties are judicial in their nature.**"

Spring Valley, &c., Co. vs. Schottler, 110 U. S. 354.

In the authoritative and oft-quoted case of **Chicago, &c., Co. vs. Dey,** 35 Fed. Rep. 874, it was held that the function, as exercised by a Commission, was **administrative.**

See also Cin., &c., Co. vs. I. C. C., 162 U. S. 196.

In **Reagan vs. Farmers' L. & T. Co.,** 154 U. S. 397, the function was described as "**legislative or administrative.**"

Finally, in **Texas, &c., Co. vs. I. C. C.,** 162 U. S. 216, the function was referred to as **legislative only**—a view which has been since distinctly held.

See I. C. C. vs. Railway Co., 167 U. S. 499, 505, and
L. & N. vs. McChord, 183 U. S. 495.

Referring to this subject, Mr. Justice (then Circuit Judge) Brewer, in Chicago vs. Dey (supra), said:

> "**While, in a general sense, following the language of the Supreme Court, it must be conceded that the power to fix rates is legislative; yet the line of demarkation between legislative and administrative functions is not always discerned. They run into each other.**"
>
> **Chicago, &c., Co. vs. Dey,** 35 Fed. 874.

It is respectfully suggested that the same observation is true of some legislative and **judicial** functions, and that, after all, the court may not have been wholly wrong when, in Spring Valley, &c., Co. vs. Schottler, 110 U. S. 354, it referred to rate-making as "**judicial in its nature**"; or when, in **Hibben vs. Smith,** 191 U. S. 231, it referred to **a town council,** in laying a local assessment, as "acting somewhat in **a judicial character**".

One of the chief distinguishing characteristics of legislative and judicial acts is that the former is **prospective,** while the latter is **retrospective,** in its operation.

Some very well established judicial functions, however, are wholly prospective in their effect, as, for instance, an **injunction**—especially a mandatory injunction—and the court's attention is respectfully called to the obvious analogy between the **legislative act of rate-making** and the **judicial act of granting an injunction**.

Between these two functions, it is respectfully submitted, there exists only the difference—largely, if not wholly, academic—between **legislatively enacting** that railroads shall not charge more than two cents, and **judicially enjoining** them from charging more than two cents.

Whatever this difference be in theory, can such difference possibly exist for any practical purposes?

When a purely legislative body has prescribed a rate, it is a conceded function of the courts to judicially consider and determine its reasonableness, **before it becomes effective**, and, if found to be reasonable, to enjoin the carrier from exceeding it. Why cannot these identical functions be performed by the court in respect of a rate that has merely been **suggested**, as well as of one that has been formally **enacted?** Is there any magic quality in the act of enactment that loosens the fetters of judicial power to consider a given rate, decide upon its reasonableness, and enjoin its violation?

Attention is invited to the very striking analogy between the principles involved in the prescribing of rates by the Virginia Commission, and the action of the Federal Courts in prescribing **future** rules for the distribution, without discrimination, of coal-cars, and commanding the observance of such rules by the carrier.

See **U. S. vs. W. Va. &c. R. Co.**, 125 Fed. 252-8.

In the particular cases now under consideration here, the General Assembly of Virginia, instead of "enacting" a two cent rate, and then letting the courts suspend its enforcement, judicially determine its reasonableness, and then enjoin its violation—instead of this, the General Assembly, by the joint resolution above mentioned (ante p. 72), **proposed or suggested the rate**, and requested the court (the Corporation Commission) to judicially determine its reasonableness, and, if found reasonable, to prescribe and enforce it—in effect, to enjoin its violation.

What conceivable difference can there be between these two courses, so far as anything in the Federal Constitution is concerned? If the first course would have been permissible under the Federal Constitution, why, in reason, could not the latter? What conceivable protection would the railroads have gotten in case the General Assembly had formally "enacted" the rate before it was taken in hand by the court, that they did not get when the General Assembly merely "recommended" it for investigation by the court? What right of the carrier was violated by the rate being merely "**proposed,**" instead of being "**enacted,**" before it came under judicial cognizance? Is it not, after all, a matter which does not affect any single substantial or practical right of the carrier, but is rather a mere matter of procedure and practical expediency for the sole determination of the State government? These questions carry their own answers.

For these considerations, we submit that, even though the proper technical classification of the rate-making power be "Legislative", yet it bears so strong an analogy to certain well established Judicial functions, that even **a statute** (not merely a constitutional enactment) **might validly confer it upon a court.**

XVI.

LEGISLATIVE FUNCTION EXERCISED BY COURT.

Irrespective, however, of any of the considerations above mentioned, as to the exact nature and correct classification of the rate-making power, and proceeding, as will be done throughout this note, on the theory that **rate-making is distinctively a legislative function,** it is beyond question that the conferring of that **concededly legislative function** upon a **distinctively judicial court,** is entirely within the power of a State **Constitution,** violates no provision of the Federal Constitution, and in no wise affects the power of such court to **judicially consider,** and, by "due process of law", to investigate and determine, the question of the reasonableness of a rate, which, after such determination, it may have the power to **legislatively prescribe.**

As pointed out in Chapter VII of this note, there is nothing in the Federal Constitution to prevent the valid combination of legislative and judicial functions in one body; and, as a matter of fact, it is believed that, with the possible exception of California, **there is not a State in the Union in which such a combination does not exist.**

XVII.

PRECEDENTS FOR COURT-MADE RATES.

In **Hurtado vs. California**, 110 U. S. 528, this Court said:

> "**A process of law which is not otherwise forbidden must be taken to be 'due process of law', if it can show the sanction of settled usage both in England and in this country; but it, by no means, follows that nothing else can be 'due process of law'.**"

It will now be pointed out that, both in England and (from the beginning, continuously to the present time) in Virginia, there has been **ample precedent for courts exercising distinctly legislative functions of government, including that of rate-making itself.**

In England, by Stat. 5, Eliz. (1562) c. 4, Sec. 15, it was made the duty of the **justices of the peace** in every shire to meet annually with the sheriff of the county, if convenient, and with the mayor of any city or town in any shire, and to **rate the wages** for all artificers, laborers, &c.

And, by Stat. 3 W. & M. (1692), c. 12, Sec. 2, it was enacted that,

> "**The justices of the peace of every county and other place within the realm of England or Dominion of Wales, shall have power and authority, and are hereby enjoined and required, at their next respective quarter, or general session after Easter day, yearly, to assess and rate the prices of all land carriage of goods whatsoever, to be**

> **brought into any place or places within their respective limits and jurisdictions by any common carrier or wagoner."**

In Virginia, prior to the present Constitution, which became effective in 1902, the judicial system included both Circuit Courts and **County Courts**—the latter were abolished by the present Constitution.—See Virginia Constitution, 1902, Sec. 7 of Schedule, which says:

> **"The present judicial system of County and Circuit Courts of the Commonwealth is continued * * * until the first day of February, 1904," &c., &c.**

Referring to these old County Courts (for the origin and antiquity of which, see the note by Benjamin Watkins Leigh, at page 244 of the Virginia Code of 1819), the Supreme Court of Appeals of Virginia said:

> **"The court which lays the county levy is not a special tribunal created for that particular purpose. It is the ordinary county court. That court is a court of general jurisdiction."**
>
> **Ballard vs. Thomas,** 19 Gratt. 14.
>
> **"With respect to all powers vested in them, whether exercised according to the course of the common law or by statute, they were courts of general jurisdiction to the same extent as the Circuit Courts. In both instances the same presumption arises with respect to the conclusiveness of all proceedings and judgments of the court."**
>
> **Pennybocker vs. Switzer,** 75 Va. 685.

Now, some of the **powers** vested in **these judicial courts of general jurisdiction,** are as follows:

To **prescribe the rates** to be charged by **ferries.**—Virginia Code 1819, Vol. 2, p. 261; Virginia Code 1873, pp. 612 and

615; Virginia Code 1887, sec. 1379; Virginia Code 1904, secs. 1377 and 1379.

To **prescribe the rates** to be paid at **ordinaries** for liquors, diet, lodging, &c., and to increase or lessen such rates as often as deemed necessary.—Virginia Code 1819, Vol. 2, p. 281.

To **fix the rates,** charges and regulations for wharves at county landings.—Virginia Code 1887, Section 999.

See also Appendix No. 1 to this note for a long list of other and plainly legislative functions with which, for a hundred years or more, the regular judicial courts of Virginia have been charged, and in the exercise of which they have always judicially administered "due process of law".

Thus, it will be seen that providing for a judicial court to fix and regulate rates, in a proceeding to which the carrier to be affected is made a party, and given due notice and a full hearing, and, in which, all judicial questions affecting the rate are judicially considered and, by due process of law, decided, is **no new departure** in Virginia, but is merely a continuance of **the practice in the regulation of rates for carriers, ferries and inn-keepers, both in England and in Virginia since the foundation of modern government.**

In all the long ages in which this rate-making power has been exercised by English and Virginia courts, no one has ever doubted that "due process of law" was thereby administered, either because there was "no plaintiff", in the proceedings, nor because they were initiated by the court sua sponte, nor for any other reason.

Nor are England and Virginia peculiar in having judicial courts exercise the "legislative" function of prescribing rates, or other regulations for businesses "affected with a public interest"—for, after all, **rates are merely a form of regulation**—but, on the contrary this practice has long existed in other (if not all) the States of the Union.

In 1797, the Legislature of **New York** conferred upon the **Courts of Common Pleas** of the various counties power **to prescribe the tolls to be charged** by ferry keepers.—**New York Laws** 1797-1800, Chap. 64, p. 91; and such power, in that State, appears to be still vested in the county and city courts.—**N. Y. Highway Laws** 1890, p. 1207, Chap. 568, Sec. 170-171.

In 1895, the Legislature of Massachusetts conferred upon the **Supreme Judicial Court** of that State **power to fix rates** for water companies; and in a learned and elaborate opinion, the Supreme Court of that State sustained the validity of the provision.—**In re Janvrin,** 174 Mass. 514.

In 1881, it was held that Congress could confer upon a **Federal Court** the **power to fix rates** of compensation for use of a bridge.—**Canada, &c., Co. vs. International Bridge Co.,** 8 Fed. Rep. 190.

In 1890, this court held that a **Circuit Court of the United States might fix rates** of compensation for use by one railroad of the track or property of another, observing that the making of regulations for a railroad was nothing more than a court of equity was obliged to do when it **operated a railroad by a receiver.—Joy vs. St. Louis,** 138 U. S. 47.

In view of these, and countless other similar precedents that could be cited, how can it be maintained that there is anything novel, unconstitutional or intrinsically inconsistent or wrong, in conferring upon a **court** the power to prescribe railroad rates?

XVIII.

ANTICIPATORY LITIGATION.

Even under the method of procedure contended for by Appellees, the court must, at some time, pass upon the reasonableness of the rate. That there is no reason, in the nature of things why this cannot be done, **as well before, as after,** its formal **enactment,** has already been pointed out.

Where innumerable transactions will inevitably be had, and innumerable property rights arise, under a specific enactment or regulation, it is of the greatest importance that all questions affecting its validity be settled, if possible, before the enactment goes into effect; because, if, after it becomes effective, and has been in force for some time, it be then declared void, the confusion of rights resulting, and the frequent impossibility of **undoing what has already been done under the supposedly valid regulation,** is often most disastrous to all concerned. Of nothing is this more true than of railroad rates, as witness the **utter chaos** which has resulted

in the Lumber Rate Cases of Georgia and Oregon, where a rate, after being in effect for several years, was declared unreasonably high, and the railroads were ordered to make reparation.

See **Tift vs. Southern Ry.**, 123 Fed. 789; 138 Fed. 753; 206 U. S. 428.

The great advantage of having the validity of a law passed upon, **in advance** of its enactment, has long been recognized.

In the Federal Convention of 1787, it was proposed that this honorable Court should decide in advance upon the validity of a contemplated Act of Congress, the validity of which should not thereafter be questioned. In several States provision at one time existed for taking the judgment of the highest State court upon constitutional questions affecting contemplated legislation, upon the request of the Governor or Legislature.

The idea was found unworkable, in cases involving **general laws**, not because of any difficulty resulting from considering their validity in advance of their enactment, but simply because it would be impossible to summon, or give a hearing to, everybody to be affected by them.

Legislative Acts, however, more restricted in their operation and effect, were found susceptible of adequate judicial consideration and determination in respect of their constitutionality and validity prior to their enactment, and, in one **notable instance**, have such Acts been subjected to anticipatory adjudication as to their validity throughout the United States—the instance referred to being the **enlargement of corporate limits** of cities and towns.

That such enlargement is a **typical legislative Act**, can admit of no doubt,—**Wade vs. City of Richmond**, 18 Gratt. 583, 620—but, recognizing the vast confusion of rights and disorder that would result from a statute being declared unconstitutional or invalid in any respect after corporate limits had been actually enlarged or altered under it, the Legislatures of many States have **conferred this legislative power upon their courts**, in order that in the very exercise of it (in a proceeding in which all interested parties are brought before the court), all questions affecting the validity of its exercise may be judicially considered and finally determined

before the legislative enactment (in the form of a court order) becomes effective.

This "**anticipatory litigation**" **(Callen vs. Junction City,** 23 Pac. Rep. 652), it is believed, has been upheld everywhere except where supposed to be forbidden by the local State Constitution.

See **Henrico, &c., vs. Richmond,** 55 Southeastern Rep. 686; **Forsyth vs. Hammond,** 166 U. S. 506.

A statute enlarging the corporate limits of a city or town is so general in its effect that it might be contended, with much force, that the method of bringing before the court in such proceedings as those above referred to, is not adequate enough to amount to "due process of law" as to everybody affected; but such cannot possibly be held in case of a railroad rate, as to which only the Commonwealth and the carrier itself are entitled to any "due process" in the determination of its reasonableness. And both of these can readily be brought before the judicial tribunal charged with prescribing rates, and given a hearing by "due process of law", before the rate is prescribed, in order that **all questions affecting its validity may be determined judicially and authoritatively before the rate goes into effect.**

This was one of the chief considerations along with others herein mentioned, which prompted the late **Constitutional Convention of Virginia to take from the Legislature altogether the right to make rates,** and confer that function upon a **specially organized judicial** court, which could **bring all interested parties before it, hear and consider all evidence offered by either party pertinent to the case, and then, the Commonwealth and the carrier having each been fully heard, decide (in a manner binding and conclusive upon all parties unless appealed from) both the question of the reasonableness and the expediency of the rate at the same time and upon the same state of facts.**

In doing this, it is respectfully submitted, that Convention violated no principle and only followed numerous and long established precedents.

So far as "due process of law" is concerned we respectfully submit that the Twelfth Article of the Virginia Constitution creating the State Corporation Commission and pre-

scribing its powers, duties and procedure, is of unquestionable validity, irrespective of whether that Commission be regarded as a legislative body upon which judicial functions have been imposed, or a judicial body to which legislative powers have been granted.

In the case of **San Diego Land Company vs. National City**, it appeared that the Town Council had the right to fix water rates for a water company. Here was a case very analogous to the one now in hand. Surely there can be no difference in principle between fixing the rates for a water company and fixing the rates for a railroad company. And, yet, because of the fact that under the law of California, the company, whose rates were to be so fixed, was given a hearing before the passage of the ordinance fixing the rates, this Court held that the proceeding was "due process of law."

> **"There is no ground to say that the appellant did not in fact have, or was denied, an opportunity to be heard upon the question of rates. * * * They were heard, and there is nothing to justify the conclusion that the case of the appellant was not fully considered, before the ordinance was passed."**
>
> **San Diego Land Co. vs. National City**, 174 U. S. 753.

In this case, the company relied upon the case of **Chicago, &c., vs. Minnesota**, 134 U. S. 418, in which there was an order of the Minnesota Railroad Commission fixing rates for the plaintiff company; but the court in the San Diego case promptly pointed out the essential difference between the Minesota case and the California case in this that, in the latter case, the company was given a hearing before the Council, prior to the passage of the ordinance, whereas, in the Minnesota case, the law did not require the company to be given a hearing at all.

> **"What this court said about the Minnesota statute can have no application to the present case, unless it be made to appear that the consti-**

> tution and laws of California invest the municipal authorities of that State with power to fix water rates arbitrarily, without investigation, and without permitting the corporation or persons affected thereby to make any showing as to the rates to be exacted or to be heard at any time, or in any way, upon the subject."

[And this Court held that the laws of California did not invest the municipal authorities in that State, with any such power and, therefore, refused to apply the doctrine in the Minnesota case.]

San Diego Land Co. vs. National City, 174 U. S. 749.

In the cases now under consideration here the companies were given, and availed themselves of, a most elaborate hearing before the Commission, lasting several months, covering thousands of pages of record, and embracing expressly every single defence on the merits, both of law and of fact made by them in the Circuit Court below.

> "Whether this authority was strictly legislative or judicial, according to the distribution of power in the State government, was a question rather for that government than for this court to determine. * * * It might seem advantageous to some of the States that the judicial and legislative authorities or functions of the government should be blended in the same body; and that the legislature should in all cases exercise powers similar to those now vested in one branch of the British Parliament, and as in some specified instances in one of the houses of our own national legislature. Should such an organization be adopted by a State, whatever might be thought of its wisdom, where beyond the body politic of the State would exist any power to impugn its legitimacy?"

Baltimore, &c., R. Co. vs. Nesbit, 10 How. 399.

> "It may be true that the general rule is that the determination of the territorial boundaries

of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts, and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under Section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every State in this Union. And whenever the Supreme Court of a State holds that, under the true construction of its constitution and statutes, the courts of that State have jurisdiction over such matters, the Federal Courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution."

Forsyth vs. Hammond, 166 U. S. 519.

See also:

Spring Valley, &c., Co. vs. Schottler, 110 U. S. 354;

Hibben vs. Smith, 191 U. S. 231;

Hodge vs. Muscatine County, 196 U. S. 81;

Brooklyn &c., Co. vs. New York, 199 U. S. 51.

Carfer vs. Caldwell, 200 U. S. 297;

Dreyer vs. Ill., 187 U. S. 83-'4.

Reetz vs. Michigan, 188 U. S. 507.

Speaking of the same subject, this Court, on another occasion, said:

"Nor are they [the carriers] thereby deprived of property without 'due process of law', by statutes under which the result is ascertained in a mode suited to the nature of the case and not merely arbitrary or capricious; and that the ad-

judication of the highest court of a State, that, in such particulars, a law enacted in the exercise of the police power, is valid, will not be reversed by this Court on the ground of an infringement of the Constitution of the United States."

New York, &c., Co. vs. Bristol, 151 U. S. 571.

XIX.

COMMISSION REPEATEDLY UPHELD BY THE HIGHEST STATE COURT.

Under the provisions of the Constitution and laws of Virginia, authorizing and providing for the proceeding before the State Corporation Commission involved in these suits, it will be seen that the Railroad Companies affected are given the fullest notice, and the utmost latitude in the matter of the introduction of evidence before the Commission. They are left with a free hand to introduce any and every thing in evidence, whether in the shape of documents or witnesses, that they may think necessary for the proper presentation of their case. They are afforded every process of the Commonwealth, for compelling the presence and testifying of witnesses and the production of papers, that any litigant is afforded in any judicial proceeding. Should the Commission rule out or reject any evidence tendered by the Railroads, they have the right to except to such ruling and have it reviewed by the Supreme Court of Appeals. When the case goes to the Supreme Court of Appeals, it is still competent, in certain cases, for that court to direct the taking of further evidence—see Virginia Constitution, 1902, Section 156, Sub-Section f.

Therefore, it is perfectly manifest that, whatever may be the real or imagined prejudice, or unfavorable predilection, of the Commission in trying the issues involved in such proceedings, yet the Railroad Companies could not, by any possibility, be injured, or hampered in the matter of the production of all the evidence which they may desire to produce, or the presentation of every question of law or of fact that they may desire to present, in their behalf. When the case is heard on appeal before the Supreme Court of Appeals, that court

is in no wise bound by the judgment of the Commission on questions of law or of fact, except only that such judgment is presumed, prima facie, to be correct—a presumption which attaches even to the report of a Commissioner in Chancery. Thus, every law question, as well as every question of fact, which the Railroads could possibly have presented in their behalf before any initial or nisi prius tribunal, they can, with equal facility, urge in their behalf, without prejudice, embarrassment or difficulty, before the Supreme Court of Appeals—the judgment of the Commission appealed from, being no more prejudicial to them than would be the findings of a Master Commissioner in Chancery of an ordinary court upon a reference covering the same matters and points involved—the action and finding of the Commission being final and obligatory upon the Railroads, only in case they voluntarily elect to submit to it without appeal. How, then, is it possible to say that these proceedings do not amount to "due process of law"?

That the Virginia State Corporation Commission is a validly constituted **judicial court,** and that, under the proceedings of that body, as prescribed by the Constitution and laws of Virginia, its findings are (to use the language of this Court just above quoted from **New York, &c., Co. vs. Bristol,** 151 U. S. 571), "ascertained in a mode suited to the nature of the case and not merely arbitrary and capricious", has been repeatedly held by the Supreme Court of Appeals of Virginia, the highest Court of that State.

See **Atlantic Coast Line Ry. Co. vs. Commonwealth,** 102 Va. 599 (involving right of Commission to prescribe **rates for demurrage);**

Norfolk, &c., R. R. Co. vs. Commonwealth, 103 Va. 289 (involving right of Commission to prescribe **rates for weighing cars);**

Winchester R. R. Co vs. Commonwealth, 106 Va. 264 in which the Court says of proceedings before the Commission:

> **"It is difficult to conceive of more complete provision for 'due process of law' than is secured to the parties concerned by these proceedings."**

Commonwealth vs. Atlantic Coast Line Ry. Co., 106 Va. 61 in which the court, speaking again of this Commission says:

> "The Constitution of Virginia, in Section 156 c, provides, as to the Commission, that 'in all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record', &c. This section gives the Commission, in the exercise of its judicial functions authority to administer oaths, compel the attendance of witnesses, enter up and enforce its judgments, and confers upon it other ordinary attributes of a Court of general jurisdiction. In all matters 'within the jurisdiction of the Commission', says the Constitution, employing the word jurisdiction which is appropriately used with reference to a judicial tribunal as distinguished from legislative or administrative authority. The Commission, by Section 156 b, has conferred upon it the legislative authority to fix and prescribe rates and classifications, and to make regulations for transportation and transmission companies to the full extent to which that power exists in the State government. But in the exercise of this legislative power it cannot make its rates effective or put its regulations into force until it has summoned the company or companies to be affected before it. This is done by notice which affords due process of law to the company. The hearing or investigation upon that notice gives to the final action of the Commission the force and effect of a judgment of a judicial tribunal. Passing upon the reasonableness of rates and classifications to be prescribed by it and of regulations, orders and requirements to be

promulgated by it—in the exercise of its legislative authority—constitute the principal matters 'within the jurisdiction' of the Commission (as a judicial tribunal) as outlined by the Constitution."

For the reasons set forth in this Chapter, it is respectfully submitted that there can be no question that the proceedings of the Virginia State Corporation Commission, as prescribed by the Constitution and laws of that State, and as followed by the said Commission in the matter involved here, which culminated in the said order of April 27th, 1907, **have every essential element of "due process of law"**, and constitute "due process of law" in the fullest sense of that term.

SEE POST P. 141 & SEQ

Chapter IX.

EQUAL PROTECTION OF THE LAWS.

In Virginia the nisi prius court, authorized to pass upon the justness and reasonableness of a contemplated rate regulation in advance of its final enactment, differs from any other judicial tribunal of the State in that it is also clothed with the legislative power of prescribing such rate, if found to be just and reasonable. Does this fact deprive the companies, affected by such rate, of the equal protection of the laws?

The learned counsel for the Appellees insist that, because the citizens generally of the State are entitled to have their rights adjudicated by judicial tribunals which have no such legislative functions, therefore to require the Railroad Companies to have **their** rights adjudicated by judicial tribunals clothed also with such legislative functions, is to deprive such companies of the equal protection of the laws, in this that they are denied the privilege of having their rights determined by the same kind of judicial tribunal which determines the rights of all other persons.

The only thing in the Federal Constitution about "equal protection of the laws", so far as applicable to State laws, is found in the Fourteenth Amendment, and, as has been decided by this Court, again and again, this provision does not in the slightest degree impair or hamper the right of the States to **classify** any subjects with which their laws deal, provided only that the classification is a reasonable, and not a merely arbitrary, one. In the residue of this chapter, it will be assumed that this Commission, in performing its judicial functions, will proceed by "due process of law", just like any other court would. Whether the proceedings of this Commission amount in fact to due process of law or not, has been discussed in the preceding chapter; and for the purposes of this chapter, it is assumed that those proceedings **do** amount to "due process of

law", and the only question which will now be dealt with is, whether it amounts to a denial of the "equal protection of the laws" that the railroads are required to submit their rights to the adjudication of one "kind of court", while everybody else can submit their rights to other "kinds of courts", when both kinds of courts proceed by due process of law.

As has been repeatedly said by this Court, the guarantee, in the Fourteenth Amendment, of the "equal protection of the laws", by no means requires a State to deal with all of its citizens alike, nor does it prohibit special legislation. The provision is not violated by making special laws and special regulations for various classes of persons or employments, so long as the classification is rational and fair. All that is required is that all persons in consimili casu shall be treated alike.

> "**The objection that the law * * * deprives the railroads of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that the legislation which is special in its character is necessarily within the Constitutional inhibition, but nothing can be further from the fact. The greater part of our legislation is special, either in the object sought to be attained by it or in the extent of its application * * * such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws because it is special in its character. * * * When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions * * * ".**
>
> **Missouri Ry. Co. vs. Mackey,** 127 U. S., p. 209.

> "**Class legislation, discriminating against some, and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its ac-**

> **tion, it affects alike all persons similarly situated, is not within the amendment.''**
>
> **Barbier vs. Connelly,** 113 U. S., p. 32.

In the case of Soon Hing vs. Crowley there was involved the validity of an ordinance of San Francisco, restricting the hours of labor in public laundries within certain defined territorial limits, but leaving laundries outside of these limits free from regulation. It was claimed that this ordinance deprived persons, owning laundries within the prescribed limits of the equal protection of the laws, because they were subjected to regulations which other people in the same business, located in different parts of the town were not subjected to. This Court, however, overruled the objection, because, it said:

> **''All persons engaged in the same business within the prescribed limits are treated alike and subject to similar restrictions.''**
>
> **Soon Hing vs. Crowley,** 113 U. S., p. 703.

Later on, this Court held that a State law for the valuation of property, and assessment of taxes thereon, which makes for one class of property one set of provisions as to modes and methods of estimating the value, and different provisions for another class, as to those subjects, ''but which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected the 'equal protection of the laws'.''

Kentucky Ry. Tax Cases, 115 U. S., p. 322.

> **''When such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances in respect to the privileges conferred upon them and the liabilities to which they are subjected.''**
>
> **Home Insurance Co. vs. New York,** 134 U. S., p. 606.

In another case, a State law, imposing taxes, made a special class of express companies "who carry on the business of transportation on contracts for hire with railroad and steamboat companies"; it was contended that such express companies were denied equal protection of the laws, because the law did not apply to other express companies, or other persons, carrying freight; but this court held otherwise, in view of the fact that is applied equally to all individuals of the class.

Pac. Exp. Co. vs. Seibert, 142 U. S., 339.

> "**The State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion.**"
>
> **McGoun vs. Ill. Trust & Sav. Bnk.,** 170 U. S., 294.
>
> Reiterated in Orient etc. Co. vs. Daggs, 172 U. S., 562.

> "**The right to the equal protection of the laws was certainly not denied, for it is apparent that the same law or course of procedure which was applied to Tinsley, would have been applied to any other person in the State of Texas, under similar circumstances and conditions.**"
>
> **Tinsley vs. Anderson,** 171 U. S., 106.

> "**Classification for such purpose is not invalid because not depending on scientific or marked differences in things or persons, or in their relations. It suffices, if it is practical, and is not reviewable unless palpably arbitrary.**"
>
> **Orient etc. Co. vs. Daggs,** 172 U. S., 562.

And thus, without exception, and in a large number of other cases, this Court has uniformly held that the clause in the Fourteenth Amendment relative to the "equal protection of the laws" put no restriction upon the right of the State to classify persons and businesses for the purpose of special legis-

lation with reference to each class, provided only that the classification is based upon rational and fair ground, and that all individuals composing each class are dealt with alike. Thus it was held:

That the law of **fellow servants** could be modified in its relation to railroad companies alone.

Mo. etc. Co. vs. Mackey, 127 U. S., 205.

Tullis vs. Lake Erie etc. Co., 175 U. S. 348.

That a law requiring only of railroad companies that they **fence their tracks,** and making them liable to **double damages** for injuries resulting from their failure to fence, did not deprive such companies of the equal protection of the laws, although it was applicable to no other kind of corporation or land owner.

Mo. etc. Co. vs. Humes, 115 U. S., 512.

That a statute requiring an **attachment bond** as a pre-requisite of an attachment against a resident, but dispensing with such bond in the case of attachment against a non-resident, does not deprive such non-resident of the equal protection of the laws.

Cen. Loan etc. Co. vs. Kansas, 173 U. S., 97.

That a statute requiring **of railroad companies only** that they pay a reasonable **attorney's fee** to the plaintiff recovering damages against such company for fires, does not deprive such company of the equal protection of the laws, although applicable to no other kind of company excepting railroad companies.

Atchison etc. Co. vs. Matthews, 174 U. S., 96.

That a law prescribing one method of procedure in **forfeiting, for non-payment of taxes,** tracts of land containing more than 1,000 acres, and exempting from its operation tracts of land containing less than 1,000 acres, does not deny the owners of the larger tracts of land the equal protection of the law.

King vs. Mullins, 171 U. S. Rep., 335-6.

That a statute prohibiting the **inclusion of agricultural land** in the territory annexed to a municipal corporation should not apply to such land when owned by a railroad or other corporation, did not deny such "railroad or other corporation" the equal protection of the laws.
Clark vs. Kansas City, 176 U. S., 114.

That classification of property for the **purposes of taxation,** according to different systems, and at different rates, is not a violation of the provision against equal protection of the laws.
Bell's Gap etc. Co. vs. Pa., 134 U. S., 232.

That a law imposing a **special penalty** for non-payment of taxes upon telegraph companies, does not deny such companies the equal protection of the laws.
Western Union Tel. Co. vs. Ind., 165 U. S. 304.

That a law giving a **lien for the purchase price** of supplies furnished to a certain class of corporations, but giving no similar lien against individuals or any other class of corporations, does not deny the equal protection of the laws to those corporations against whom such lien is furnished.
Va. etc. Co. vs. Crozier, 90 Va. 126.

That a law placing a **higher rate of taxation** upon large inheritances than upon small, does not deny the equal protection of the laws to the person entitled to the large inheritance.
Plummer vs. Coler, 178 U. S., 115.

That a law **distributing,** for taxation purposes, **rolling stock** and other unlocated personal property of the railroad companies to and for the benefit of the counties traversed by the railroad, although applicable to the unlocated personal property of no other corporation or individual, does not deny such railroad companies the equal protection of the laws.
Colum. etc. Co. vs. Wright, 151 U. S., 470.

That a law **limiting the period of labor** to eight hours per day, and made applicable only to mining companies, does not

deny such companies the equal protection of the laws.
Holden vs. Hardy, 169 U. S., 366.

That a statute **reducing the tolls** on one turnpike only, leaving the tolls of all other turnpikes regulated by the general law, does not deprive such company of the equal protection of the laws.
Covington etc. Co. vs. Sanford, 164 U. S., 578.

That the property of **an express company** may be subject to a special method of taxation, without denying it the equal protection of the laws.
Adams etc. Co. vs. Ohio, 165 U. S., 194.

That a special method may be provided for the taxation of **bank stock,** without denying the owners of such stock the equal protection of the laws.
Mer. Bank vs. Pa., 167 U. S., 461.

That a statute **classifying railroad corporations** by the length of their lines and fixing a different limit of the rate of fares for each class, does not deny them the equal protection of the laws.
Dow vs. Beidelman, 125 U. S., 680.

That a law making **special regulations for elevators** in cities of 130,000 population and over, but not applicable to elevators in smaller cities, does not deny the equal protection of the laws.
Budd vs. New York, 143 U. S., 517.

That a law prohibiting the **use of car stoves by** railroad corporations whose lines were more than 50 miles in length, but permitting the use of such stoves by companies whose lines were of less length, did not deny the equal protection of the laws.
New York etc. Ry. Co. vs. New York, 165 U. S., 633.

And so we might almost indefinitely continue the list of cases in which the right of a State to classify persons, prop-

erty and businesses, and to make special regulations and Governmental provisions for each class, has been liberally upheld by this Court as a non-violation of the Federal provision against the "equal protection of the laws", so long only as such classification has any rational or fair basis and so long as the individuals of each class are treated equally.

For these reasons we submit that special provisions could be made by the State for the regulation and control of railroads, although those provisions had no application to any other kind of transportation company or to any kind of transmission company; but when those provisions are broad enough to include **all transportation and all transmission companies,** as is the case in Virginia, then, we submit, it is a fortiori true that such a classification and distinction between such companies and all other classes of business, is both rational and fair.

Applying these thoroughly well established principles to the case in hand we believe the proposition can not be successfully refuted, that the mere fact that the judicial inquiry into the reasonableness of a proposed rate, applicable to transportation and transmission companies is to be passed upon by a judicial tribunal organized differently from all of the other judicial tribunals in the State, does not of itself deny such corporations the "equal protection of the laws".

If it be true that a railroad company cannot be subjected to the jurisdiction of a **judicial** tribunal organized and constituted differently from the **judicial** tribunals having jurisdiction over other business in the State, without denying such railroad companies the equal protection of the laws; then it would be equally true that a railroad company could not be subjected to any legislation enacted by a **legislative** body organized and constituted differently from the **legislative** body which makes laws for other property and businesses. In other words, if the State cannot subject its railroad companies to the jurisdiction of a specially constituted **judicial** tribunal, then it is equally true that the State cannot subject such corporations to the jurisdiction of a specially constituted **legislative** tribunal, such as the ordinary legislative commission, which it is well settled it could do.

In case of Missouri vs. Lewis, it appeared that, by the Constitution and laws of the State of Missouri, the city of St. Louis and a few specified counties were placed under the jurisdiction of a special Court, called the St. Louis Court of Appeals. This Court was given conclusive appellate jurisdiction of all cases, civil and criminal, arising in the city of St. Louis and the said specified counties. It was provided, however, that questions of Constitutional law and cases involving over $2,500.00 could be appealed from such special Court of Appeals to the general Court of Appeals of the State; but no other questions could be taken to the general Court of Appeals of the State by people living in said appellate district, although they might be taken there by people living anywhere else in the State. It was claimed that this provision denied to the people in the said special appellate district the equal protection of the laws, in that, they were denied access to the general Court of Appeals of the State in a large class of cases in which all people in the State living outside the said appellate district were given access. This point, however, was not sustained. In disposing of the question Mr. Justice Bradley said:

> **"The Amendment could never have been intended to prevent a State from arranging and parceling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included in the prohibition that 'no State shall deny to any person within its jurisdiction the equal protection of the laws.' * * * There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. * * * The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. * * * Each State prescribes its own modes of judicial proceeding. * * * Diversities which are allowable in different States are allowable in dif-**

ferent parts of the same State. * * * It may be desirable to have different systems of judicature in different portions of the State—trial by jury in one, and not in another, for example."

Missouri vs. Lewis, 101 U. S., 30, 31, 32.

"There is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike, * * * nor are they thereby deprived of property without 'due process of law' by statutes under which the results are obtained by methods suited to the nature of the case, and not merely arbitrary and capricious; and the adjudication of the highest Court of the State that, in such particulars, a law enacted in the exercise of the police power of the State, is valid, will not be reversed by this Court on the ground of infraction of the Constitution of the United States."

New York etc., vs. Bristol, 151 U. S., 571.

The validity of the State Corporation Commission as a legally constituted tribunal or organ of the State, clothed with legislative, judicial and executive powers, for the exercise of the police power of the State for regulating railroads, was fully recognized and confirmed by "the highest Court of the State" in **Atlantic Coast Line vs. Commonwealth,** 102 Va., 599, and in **Winchester, &c., Co. vs. Commonwealth,** 55 S. E. Rep., 692.

See also **Commonwealth vs. A. C. L. R. Co.,** 106 Va., 64-5.

In the case of Cincinnati, etc., vs. Snell, there was involved the validity of a statute of Ohio which provided that when a corporation having more than fifty stockholders is a party to an action, the opposite party shall be given the right of removal of the cause from one court to another, which he would not have, had the corporation had less than fifty stockholders, and which the corporation itself in no event would have. It was contended that this denied the corporation hav-

ing more than fifty stockholders the "equal protection of the laws". This Court, however, held otherwise, Mr. Justice White saying:

> "This proposition was long since decided to be untenable—Missouri vs. Lewis, 101 U. S., 22; Chappell Chemical & Fertilizer Co. vs. Sulphur Mining Co., 173 U. S., 474. In the first of these cases it was directly held that the Fourteenth Amendment did not operate to deprive the several States of the complete power to create such courts as were deemed essential, and endow them with such jurisdiction as was considered appropriate. * * * It is not, under any view, the mere tribunal into which a person is authorized to proceed by a State which determines whether the "equal protection of the laws" have been afforded; but whether, in the tribunals which the State has provided, equal laws prevail. * * * It is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal obligations be enforced provided the method of procedure adopted for the purposes gives reasonable notice and affords reasonable opportunity to be heard before the issue is decided."
>
> Cincinnati, etc., Co. vs. Snell, 193 U. S., 35, 36, 37.

> "When a State Legislature [and a fortiori a State constitution] has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the court, under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that

would not require with equal force its extension to others whom it leaves untouched."

Mo. etc., Co. vs. May, 194 U. S. 269.

"It is not the purpose of the Fourteenth Amendment, as has frequently been held, to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred, or liabilities imposed."

Field vs. Barber Asphalt Co., 194 U. S., 621-2

"Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed, not merely one hearing before the county officials, but also a right of appeal, with a second hearing before the State Board, while only the one hearing before the latter Board is given to railroad companies in respect to their property, therefore the latter are denied the 'equal protection of the laws.' * * * The power of a State to make classifications in judicial, or administrative, proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing."

Pittsburg, &c., Co. vs. Backus, 154 U. S., 427.

That there is fair and excellent reason for the establishment of a peculiarly constituted judicial tribunal, such as the State Corporation Commission, to pass in advance of its enactment upon the validity of a proposed regulation of transportation and transmission companies, which reason does not, with equal

force, require the extension, to the public generally, of the jurisdiction of such a tribunal, is too plain for argument.

The foregoing reasons and authorities, we respectfully submit, fully and conclusively settle the question that the mere fact that transportation and transmission companies in the State of Virginia are required to submit the question of the reasonableness of a proposed regulation to the decision of a judicial tribunal differently organized and constituted from the judicial tribunals which hear and determine other judicial questions affecting the interests of persons other than transportation and transmission companies, does not of itself deny such companies the "equal protection of the laws", especially when such tribunal is merely a nisi prius tribunal fully reviewable by the regular Supreme Court of Appeals of the State.

One of the grounds upon which the jurisdiction of the U. S. Circuit Court below was invoked in these cases is, that the Corporation Commission prescribed **different rates for different railroads**. To this we reply, first, that such a proceeding has had the repeated sanction of this Court.

Dow vs. Beidleman, 125 U. S., 680;
Covington Turnpike Co. vs. Sandford, 164 U. S., 578;
Chicago &c. vs. Iowa, 94 U. S., 164;
Ruggles vs. Illinois, 108 U. S., 526;
Ill. Cent. vs. Illinois, 108 U. S., 541.
McChord vs. L. & N., 183 U. S., 494.
Chicago &c. Co. vs. Wellman, 143 U. S., 339.

Second, that even if this were not true, the fault would only be an **error** correctable upon **appeal**, but which would not affect the **jurisdiction** of the tribunal making the error.

Chapter X.

SECTION 720 OF THE UNITED STATES REVISED STATUTES.

I.

NATURE AND EXTENT OF THE STATUTORY RULE.

Section 720 of the Revised Statutes of the United States is as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy."

Speaking of this statute, in a case before the United States Circuit Court for the Western District of Missouri, Judge Phillips, who delivered the opinion of the court said:

> "In the adoption of the addition to the Act establishing the judicial courts of the United States, as early as March 2, 1793, this limitation on the jurisdiction of Federal Courts was placed upon the statute to give the force of positive law to this rule of comity in order to preserve the essential and necessary comity between the Federal and State courts and determine the independence of each."
>
> **Dillon vs. Kansas City &c., Co.**, 43 Fed., 109.

A few years later, Judge Caldwell, speaking of the same statute said:

> "This section, save the exception, is as old as the judicial system of the United States. Its prohibition is absolute and unqualified, except where the injunction is authorized by law in proceedings in bankruptcy. This exception serves to emphasize the prohibition as to all cases. In cases where the jurisdiction of the court of the United States first attaches, the statute has no application; but, in the cases we are considering, the jurisdiction of the State courts first attached, and that fact, independently of the statute, according to a well settled rule, is a bar to the jurisdiction of this court."
>
> **Hemsley vs. Myers,** 45 Fed. Rep., 289.

The case, in which the learned Judge delivered this opinion, was one in which the State court had issued an injunction against a party who, after the issuance of the injunction, applied to the United States Circuit Court for relief on the ground that the statute, under which the State court was acting, was in violation of the United States Constitution, and his prayer was that further proceedings in the State Court be injoined. The Federal court refused to take jurisdiction.

As hereinbefore pointed out, the order of the State Corporation Commission prescribing a maximum passenger rate, beyond which the railroads are ordered not to increase their charges, is, in its nature, very analogous to an injunction. The plaintiffs here, as in the Hemsley case, allege that the State tribunal was without jurisdiction, and pray an injunction against its further proceedings. For the same reason that the court refused to take jurisdiction in the Hemsley case, we respectfully submit it ought, and will, refuse to take jurisdiction in this case.

Proceeding to discuss the rule as laid down in Section 720 of the Revised Statutes, Judge Caldwell, in the opinion above quoted from, said further:

"To the observance of the rule enunciated by this section and other cognate rules, we are indebted for the almost universally harmonious relations that have existed between the State and the United States courts, from the foundation of the government down to the present time. The rule would probably have been the same independently of the statute. The State courts observe the rule towards the courts of the United States upon principle, and without any statute requiring them to do so. It is not merely a rule of comity, but an absolute rule of law, obligatory on the courts of both jurisdictions, and absolutely essential to the maintenance of harmonious relations between the State and the United States courts, and indispensable to the due and orderly administration of justice in both. Appeals may be taken in certain cases from the State courts, to the Supreme Court of the United States, and in this way suitors claiming a right or privilege under the Constitution of the United States, or any act of Congress, or a treaty, may have the validity of their claim finally determined by the Supreme Court of the United States; but the District and Circuit courts of the United States possess no appellate or supervisory jurisdiction over the State Courts. The Circuit Court of the United States and the State courts are each destitute of all power either to restrain or review the process or proceedings in the other. This rule has had the approval of the courts, lawyers, legislators, and laymen from the beginning of our system of government. The rule commends itself to the common sense of all mankind; and there can be no higher evidence of the soundness of a rule of law than that there is a

> universal consensus of opinion that it is sensible and just."
>
> **Idem**, p. 289.

Again, Judge Toulmin, speaking for the Circuit Court of Appeals for the Fifth Circuit, in a still later case, said, in reference to this same Section 720:

> "The framers of our statute laws, foreseeing the evils of such conflicting jurisdiction, have wisely prohibited in express terms the granting of injunctions to stay proceedings in any court of a State. * * * This prohibition of the statute extends to all cases over which the State court first obtains jurisdiction, and applies, not only to injunctions aimed at the State itself, but also to injunctions issued to parties before the court, its officers or litigants therein."
>
> **Whitney vs. Wilder**, 54 Fed., 544.

Discussing the same matter, the Circuit Court for the Southern District of Ohio, in 1879, used this language:

> "So far as we know, the decisions have been uniform that the Federal and State courts are so far independent of each other that injunctions will not be granted by either against the officers or the parties litigant in the other, staying proceedings in such court. * * * To say that the rights of this complainant are not fully protected in the State court; * * * and to demand of us, virtually, to stop the progress of this suit, and to sweep the subject-matter of the litigation and the contentions of these parties within the jurisdiction of this court, is requiring more of us, we believe,

> than has ever been granted by any court of the United States."
>
> **Reinach vs. Atlantic, &c., Co.**, 58 Fed., 44.

Going still further back, we find that Mr. Justice Clifford, speaking for this honorable Court, on this subject, in 1867, said:

> "Circuit Courts, and State courts act separately and independently of each other, and, in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them was traced by land marks and monuments visible to the eye. Appellate relations exist, in a class of cases, between the State courts and this court [U. S. Supreme Court], but there are no such relations between the said courts and the Circuit Courts."
>
> **Riggs vs. Johnson County**, 6 Wallace, 195.

In a previous case, decided in 1855, Mr. Justice Grier, speaking for this Court, on the same subject, had said:

> "The bill acts by injunction on the party—no injunction ever goes to the court having a concurrent jurisdiction of the question."
>
> **Orton vs. Smith, 18 How.**, 265.

In this connection attention is called to Section 629 of the United States Revised Statutes, as amended by the Act of March 3rd, 1875, Chapter 137, which says:

> "The Circuit Courts of the United States shall have original cognizance, concurrent with courts of the several States, of all suits of a civil nature arising under the Constitution and laws of the United States."

The great and leading case on this subject, however, is the oft cited case of **Peck vs. Jenness**, decided by this honorable Court in 1849. In this case, Mr. Justice Grier, speaking for the court, said:

> "It [the State court] was an independent tribunal, not deriving its authority from the same sovereign, and as regards the District court, a foreign forum, in every way its equal. The District court had no supervisory power over it. The acts of Congress point out but one mode by which the judgments of State courts can be revised or annulled, and that is by this court [the Supreme Court of the United States] under the Twenty-Fifth Section of the Judiciary Act. In certain cases, where one of the parties is a citizen of another State, he has the privilege of removing his suit to the Courts of the United States, but, in all other respects, they are to be regarded as equal and independent tribunals. It is a doctrine of law too long established to require citation of authority, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding on every other court; and that, where the jurisdiction of a court, * * * [has] once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity."
>
> **Peck vs. Jenness**, 7 How., 624.

Speaking for this Court, in 1875, Mr. Justice Bradley said on this subject:

> "In the first place, the great object of this suit is to enjoin and stop litigation in the State court and to bring all the litigated questions before the Circuit Court. This is one of the things which the Federal courts are expressly prohibited from doing. By the Act of March 2nd, 1793, it was declared that a writ of injunction should not be granted to stay proceedings in a State court. This prohibition is repeated in Section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankruptcy law. This objection alone is sufficient ground for sustaining the demurrer to the bill."
>
> **Haines vs. Carpenter**, 1 Otto, 275.

A few years later, in 1877, referring to the same matter, Mr. Justice Swain, speaking for the court, said:

> "The gravamen of what is desired as to Reynolds, is an injunction to prevent his proceeding at law in the State court. Without this, all else is of no account. Any other remedy would be unavailing. Such an injunction, execept under the bankrupt act, no court of the United States can grant. With this exception, it is expressly forbidden by law."
>
> **Diall vs. Reynolds**, 6 Otto, 341.

In the case of **Chaffin vs. City of St. Louis**, it appears that there was litigation in the State court between the City of St. Louis and a gas company therein. Pending the action in the State court, one Chaffin, a non-resident stockholder in the gas company, filed his bill in the United States Circuit Court against the city and the gas company, asking that the city be enjoined from further prosecuting the suit, and also for other matters of substantive relief. Later on, the plaintiff amended his bill by striking out so much of his prayer as asked for the

injunction against the further prosecution of the suit in the State court; but, notwithstanding this amendment, the Court held that it had no jurisdiction. Judge Dillon, speaking on the subject for the court, said:

> "But notwithstanding this, it is evident that to grant the injunction sought would, if it were effectual for any purpose, be so only because it would, in some way interfere with the progress of the litigation in that court. This, the Federal court is prohibited from doing directly by Section 720 of the Revised Statutes of the United States."
>
> **Chaffin vs. City of St. Louis,** 4 Dillon, 19.

So far has the rule enunciated in Section 720 of the Revised Statutes been carried, that, ever since the old case of **Diggs vs. Wolcott,** decided in 1807, it has been held that, **even in a case** originally brought in a State court, and afterwards **removed to the Federal court,** the latter court can not enjoin proceedings in another case still pending in a State court although such injunction might have been granted by the State court in which the removal suit was originally brought.

Diggs vs. Wolcott, 4 Cranch, 179.

II.

PROCEEDINGS OF COURT TO ENFORCE ITS DECREES.

It is **immaterial that the State court has already rendered its judgment, and that the injunction is merely against the enforcement,** or carrying out or giving effect to, such judgment. Section 720 is equally applicable to such cases.

> "I know of no authority for the doctrine that the Circuit Court, or a Circuit Judge, may interpose by injunction to prevent the execution of a

judgment of a State court [even] upon the ground that it has been superseded by an appeal to the Supreme Court."

Murray vs. Overstoltz, 8 Fed., 110.

"The restraint of the execution or complete fulfilment of proceedings of a judicial nature, is, in effect, the same as the restraint of the proceedings themselves."

Rensselaer, &c., Co. vs. Bennington, &c., Co., 18 Fed., 617.

"Whether the effect of the injunction is to stay or prevent the operation of litigation, in limine, or a judgment rendered, or to be rendered, therein, in the State court first acquiring jurisdiction, it falls within the terms of the prohibition. * * * If the order and decree of this court is to effectuate and accomplish the manifest purpose of this application for a writ of injunction, it must stop and foreclose any further proceeding in a State court. We cannot shut our eyes to obvious facts, and hear only the form and semblance of things. * * * It was, as I conceive, the very purpose and policy of the Federal statute under discussion to prevent such unseemly and hurtful conflicts between the respective courts."

Dillon vs. Kansas City, &c., Co., 43 Fed., 109.

As more fully pointed out at a subsequent place in this note (see, post p. 154), the proceedings of the Virginia State Corporation Commission, which were enjoined by the decrees appealed from in these cases now under consideration here, are, in no sense, administrative proceedings, but are **strictly judicial proceedings** by the Commission, as a judicial court, **in the enforcement of obedience by the carriers to the order or decree of the Commission,** entered April 27th, 1907 (Rec., p.

129), before these suits were instituted, **which order or decree** enjoined the carriers from charging (until the further order of the Commission) **any passenger rates in excess of those prescribed in the order.**

For the Federal Court below to thus **enjoin a State Court** (the Corporation Commission) **from "enforcing compliance with * * * its [own] lawful orders or requirements * * * by its own appropriate process"** (see Va. Constitution, Sec. 156, Sub-Sec. c, Rec. p. 86), is **as** much a **violation of the rule of section 720** of the Revised Statutes, as to enjoin the proceedings prior to the entering of said order or decree of April 27th, 1907.

See post p. 154

Chapter XI.

DENIAL OF ACCESS TO THE FEDERAL COURTS.

A.

APPEAL TO SUPREME COURT OF U. S. SUFFICIENT.

Appellees insist that unless they are permitted to maintain suits like these in the Federal **Circuit** Courts, they will be denied **all** access to Federal Courts for the protection of rights secured to them under the Federal Constitution.

Nothing could be more groundless than such a contention.

That all persons have the right (of which no State can deprive them) to resort to the Federal Courts for the protection or enforcement of their rights under the Federal Constitution, will, of course, not be denied nor questioned; but, **that State Courts have concurrent jurisdiction,** with the Federal Courts, in the consideration and decision of all Federal questions involved in proceedings before them, and that the **right of appeal to this Court** from the highest State tribunal having jurisdiction in the premises upon any Federal question involved, fully secures to the parties their right to have such questions finally decided by a Federal Court, are propositions too long settled, and too firmly established, to be now doubted.

The fact that a question arising under the Constitution and laws of the United States, is involved, does not alter or affect the rule against a Federal Court enjoining proceedings in a State Court.—On the contrary, it is manifest that **the rule applies only to such cases.**

Of course, where Federal Questions are involved, the plaintiff may institute his proceedings **originally**, either in the Federal Courts or in the State Courts, according as he may elect, under Section 629 of the Revised Statutes, giving to the U. S. Circuit Courts **concurrent jurisdiction** with **(not appel-**

late jurisdiction over) State Courts, in all such matters. In all such cases, that one of the courts having such concurrent jurisdiction, which first takes cognizance of the matter, retains it to the exclusion of the other. This is elementary.

Peck vs. Jenness, 7 Howard, 624;
Orton vs. Smith, 18 Howard, 265;
Hemsley vs. Meyers, 45 Fed. Rep. 289.

As has been decided again and again, no Federal court, with the single exception of the Supreme Court of the United States, has any **appellate jurisdiction** over a proceeding which has been instituted in a State court, and no power exists in any other Federal court to review or correct the errors of a State court. If, in the progress of a cause in a State court, Federal questions arise, that court has jurisdiction to decide them, and, whether its decisions therein be right or wrong, they are obligatory upon the parties in that, and every other, court until they are reversed by either a higher State tribunal or by the Supreme Court of the United States; and, even though the decision of the nisi prius State court be grossly and demonstrably erroneous on any Federal question, it can be neither reviewed, reversed nor ignored by any Federal court except the Supreme Court of the United States.

It is not a question of a party being unable to resort to the Federal courts for the protection of Federal rights, but merely a question of what Federal court must be resorted to for that purpose. The statutes and uniform decisions of the United States are that, where a Federal right has been ignored or misconstrued or abused by a State court which has originally had rightful jurisdiction of the controversy, the party must seek his remedy by appeal, first, to the highest State tribunal having jurisdiction, and then to the Supreme Court of the United States.

> **"If a person * * * is, by the judgment of a court of the State * * * denied any rights secured him by the Constitution of the United States, he can obtain relief by a writ of error from**

this court. [U. S. Supreme Court]. * * * Where a court has jurisdiction, it has the right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court."

In re Sawyer, 124 U. S. 219.

"If the [Federal] question is determined adversely to the defendants in the highest court of the State in which the decision could be had, the judgment may be re-examined by this court [United States Supreme Court] upon writ of error * * * the accused should have been left to be dealt with by the State court with the right, after the determination of the case in that court, to prosecute a writ of error from this court for re-examination and final judgment so far as it involved any privileges secured to the accused by the Constitution of the United States."

Fitts vs. McGhee, 172 U. S. 351.

"Appeals may be taken, in certain cases, from the State courts to the Supreme Court of the United States, and, in this way, suitors claiming a right or privilege under the Constitution of the United States, or an act of Congress, or a treaty, may have the validity of their claim finally determined by the Supreme Court of the United States; but the district and circuit courts of the United States possess no appellate or supervisory jurisdiction over the State courts. The circuit courts of the United States and the State courts

are each destitute of all power, either to restrain or review the process or proceedings in the other."

Hemsley vs. Myers, 45 Federal, 289.

"Appellate relations exist, in a class of cases, between the State courts and this court [United States Supreme Court]; but there are no such relations betwen the said court and the circuit courts."

Riggs vs. Johnson County, 6 Wallace, 195.

"The acts of Congress point out but one mode by which the judgments of State courts can be revised or annulled, and that is by this court [the Supreme Court of the United States] under the Twenty-fifth Section of the judiciary act. In certain cases where one of the parties is a citizen of another State, he has the privilege of removing his suit to the courts of the United States. But, in all other respects, they are to be regarded as equal and independent tribunals. It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every other court."

Peck vs. Jenness, 7 Howard 624.

B.

RIGHT OF REMOVAL.

The Federal Constitution (Art. 3, Sec. 2) provides that Federal Courts shall have jurisdiction of controversies between "Citizens of different States."

While this provision does not confer exclusive jurisdiction

upon the Federal Courts in the full sense of that term, yet by the Act of Congress, of March 3rd, 1875, Chap. 137, Sec. 2, it is provided that such controversies **may be removed** from State to Federal Courts.

Appellees insist that to maintain the jurisdiction and authority of the Virginia State Corporation Commission as prescribed by the Constitution and laws of the State, would **result** in depriving the carriers of this Federal **right of removal.**

This contention is answered as follows:

(a)

Moot Question.

The right of removal is not involved in these cases, because—

(1) The **right of removal does not include,** nor have any legitimate connection with the right of a Federal Court to **enjoin proceedings** in a State Court which is forbidden by Sec. 720 of the Revised Statutes.

> **"The right of citizens of other States to have their litigation generally, and the right of all to have Federal questions tried in the Federal Courts, is provided for by the statute relating to the removal of cases from the State to the Federal Courts, and the writs of error from the Supreme Court of the United States to the highest courts of the State, and are not left at all to be effected by injunctions from one court to another."**
>
> **Rensselaer, &c., Co. vs. Bennington, &c. Co.,** 18 Fed., 617.

> **"In certain cases, where one of the parties is a citizen of another State, he has the privilege of removing his suit to the Courts of the United States. But, in all other respects, they [the State and lower Federal Courts] are to be regarded as equal and independent tribunals."**
>
> **Peck vs. Jenness,** 7 Howard, 624.

In short, these appeals concern injunctions to proceedings in a State Court, and do not involve removals at all.

(2.) In addition to the foregoing, five out of the six appellees here are indisputably Virginia corporations, and it is by no means certain that the sixth one, the Louisville & Nashville Railroad Company, is not a Virginia Corporation also quoad that part of its line in the State of Virginia.

(b)

Removal Must Be In Limine.

It is well settled that, even in those cases in which the right of removal unquestionably exists, such right must be exercised, if at all, in the very beginning of the proceedings and before any substantial defense has been tendered or made. **Martin vs. B. & O. R. R.**, 151 U. S., 686-'7.

In these cases, however, the appellees appeared and tendered to the Commission a full defense,—covering every point relied upon by them afterwards in the Federal Circuit Court—in fact, the substantial portion of the Bills filed in the Federal Court were, practically, verbatim copies of the Answers which had been filed before the Corporation Commission, making not a single point of law or of fact which had not been expressly covered in their formal Answers and elaborate defenses before the Commission.

Upon these Answers, the most elaborate and extended testimony and defenses (covering several months of time and thousands of pages of record) were tendered and pressed by the appellees before the Commission, and, by that court, received, heard, considered and expressly and, in detail, decided. Surely it is **now too late** for these appellees to talk about any supposed right of removal, even if it ever did exist.

(c)

No Right of Removal Where State is Party.

As hereinbefore shown (ante p[illegible]) the Commonwealth of Virginia is the sole opposing party to the carrier in these

rate-making proceedings, either before the Corporation Commission or on appeal to the Supreme Court of Appeals of the State, or on subsequent appeal from that tribunal to this honorable Court.

Not only do the State Constitution and statutes provide for this, but, in the nature of things, the Commonwealth is the appropriate and only real party in interest, as much so as in an ordinary criminal proceeding.—that is to say that the only opposing interests to those of the carriers are the public interests, of which the Commonwealth alone is the legal or authorized representative. This is manifest, in case of all businesses "affected with a public interest", which is one of the theories upon which rests the State's right to regulate railroad rates.

But, when we consider the other, and more potential ground upon which this right of rate regulation is based, to-wit., that the construction, maintenance and operation of railroads is a function of the State, and that railroad companies are governmental agencies, created and entrusted by the State with the exercise of a governmental function and the due performance of a governmental duty, viz.: the establishment and maintenance of public highways, in connection with which these companies are entrusted with the exercise of great governmental powers, such as the right of eminent domain, &c.,—when we consider this, and that in rate-making, the State is merely exercising its supervision and control over its own agents, whom it has appointed and entrusted with the performance of a governmental duty owed by the State to its citizens, there can surely be no doubt or question that the State itself is not merely a formal, but a most substantial, party to the proceedings.

In this connection, the court's attention is again called to an essential difference between the Virginia Commission and the ordinary railroad commission.

In all other cases which have come before this court, the distinctly administrative feature of the Commission, and which conclusively showed that it could not be a court irrespective of how it was designated by the State laws, was that by the State law itself such other Commissions were authorized and empowered to sue and be sued—to appear in court as suit-

ors— in fact they were compelled to resort to a court as plaintiffs therein to compel the enforcement of their own orders and requirements—a thing which is, of course, wholly inconsistent with the character of a judicial court.

The Virginia Commission, however, true to its character of a judicial court, in the strict sense, is neither required nor authorized to appear as a suitor in any other court whatever; but is, by the Constitution of the State, authorized, empowered and required to enforce "by its own appropriate process" all of its own orders or decrees, nor has any other court of the Commonwealth any jurisdiction over it, in any manner whatever, save the Supreme Court of Appeals by way of appeal, or in mandamus or prohibition proceedings, as in the case of any other judicial court.—See Virginia Constitution. Sec. 156, Sub-section (c) and (d), Rec. p. 86-'7.

Thus it will be seen that neither the Commission nor anyone else other than the Commonwealth itself, can be the opposing party in any of these rate-making proceedings,—either formally or substantially.

That there is no right of removal on the ground of diversity of citizenship where a State is one of the parties is well settled by the decisions of this Court.

Stone vs. South Carolina, 117 U. S., 433;
Germania Ins. Co. vs. Wisconsin, 119 U. S., 475;
Postal Tel. Cable Co. vs. Alabama, 155 U. S., 487.

(d)

Removal Because of Federal Question.

The involvement of a question arising under the Constitution and laws of the United States is indeed a ground of removal; but it is well settled that for the right of removal to exist upon this ground, the fact that a Federal question is involved must appear in the case irrespective of the defense offered.

Tennessee vs. Union, &c., Bk., 152 U. S., 454;
Chappell vs. Waterworth, 155 U. S., 102.

In the proceedings, as instituted before the Virginia Corporation Commission, there is nothing to show that a Federal

question is involved, and no such question appears until raised by the appellees in their respective Answers filed before the Commission.—Rec. p. 49 & seq.

A rule to show cause why a two cent rate be not imposed, raises no Federal question. It is a Federal question as to the right of the State to impose an unreasonable or confiscatory rate upon a carrier; but the mere naming of a particular rate for consideration by the court, with a view to its being imposed, does not raise a Federal question until the carrier, by his Answer or other defense, has charged it to be unreasonable, confiscatory or otherwise in violation of such carrier's right under the Constitution.

Germania Ins. Co. vs. Wisconsin, 119 U. S., 478;
Tennessee vs. Union &c., Bank, 152 U. S., 459-460.

(e)

No Removal Where Suit Could Not Have Originated in Federal Court.

The argument of Appellees, under this branch of the subject, is that the jurisdiction of the Virginia Commission, under which the State has conferred its rate-making power upon a "judicial court", is invalid, because the Federal Court has no such rate-making power, and therefore the proceedings, in case of a non-resident carrier, could not be removed to a Federal Court, thus defeating the right of removal.

But, aside from the reasons, above given, why no right of removal could exist in these rate-making proceedings before the Virginia Commission, it is clear that the fact that the Federal laws have conferred no rate-making power upon the Federal Circuit Courts would not destroy, impair or affect the right of a State to confer such powers upon its own courts.

(1.) It is true that it has been several times held by this Court that Congress cannot impose non-judicial duties upon Federal Courts; but it is believed that no one has ever suggested as a corollary to this proposition, that a State cannot (at least by its Constitution) confer non-judicial powers or impose non-judicial duties upon its own courts. On the contrary, as hereinbefore pointed out at length in this note, such

non-judicial powers and duties have existed in State Courts from the beginning of this government, and have been repeatedly recognized and confirmed by this Court. In Virginia and New York, in particular (see ante p. —), the rate-making power itself, following the precedent of England, has been exercised by the courts for more than a hundred years.

(2.) But, is it altogether certain that rate-making is so essentially and distinctively legislative in its nature that it cannot be directly conferred by Congress upon a Federal Circuit Court, even to be exercised in the form of an injunction requiring the carrier to "cease and desist" from further changing a given rate that has been condemned, or not to charge more than a given rate that has been imposed? Do not the Federal Circuit Courts now exercise their so-called legislative functions of regulating carriers under the inter-state commerce statutes for regulating rates, distribution of cars, &c.?

(3.) Even if the Federal Circuit Courts have no power to entertain a suit **originally** instituted therein to fix or prescribe or enjoin a rate, does it necessarily follow that it could not execute such function in a proceeding removed from a State Court in which, under the Constitution and laws of the State, the State Court has power to exercise them?—See

Boom Co. vs. Patterson, 98 U. S., 403.

Hess vs. Reynolds, 113 U. S., 73.

(4.) But, irrespective of these suggestions as possibly being answers to the contention of Appellees on this point, the sufficient and conclusive answer is that the proceedings before the Virginia Corporation Commission do not constitute a "case", or "suit of a civil nature" within the meaning of the Federal Constitution and Removal Statutes.

Rosenbaum vs. Bauer, 120 U. S., 450.

Chapter XII.

THE VIRGINIA STATE CORPORATION COMMISSION IS A COURT.

A.

EXPRESSLY MADE A COURT.

That the State Corporation Commission of Virginia is, in every sense of the word, "a court" cannot possibly admit of any doubt. It is expressly made a court and called a court both by the Constitution and by the laws of that State.

> "In all matters pertaining to the * * * regulation or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt * * * and to enforce compliance with any of its lawful orders or requirements by adjudging and enforcing, by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by 'due process of law' before the Commission, sitting as a court * * *) such fines or other penalties as may be prescribed or authorized by this Constitution or by law".
>
> **Constitution of Virginia**, 1902, Section 156, Subsection (e), Rec. p. 86.

> "That the Commission on, hearing of all * * * proceedings * * * or controversies, in which it

> **shall be called upon to decide or render judgment in its capacity as a court of record, shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of this Commonwealth.''**
>
> **Act of April 15th, 1903,** Sec. 23-Rec. p. 98.

And so on in other instances, which might be named, do the Constitution and laws of Virginia refer in terms to the Corporation Commission as a "court" of that Commonwealth.

In the matter of deciding upon the reasonableness and propriety of a Railroad Crossing at grade and of determining the practicability and sufficiency of the appliances and instrumentalities proposed to be used in connection with such crossing, the Corporation Commission of Virginia has jurisdiction that no other tribunal—except the Supreme Court on appeal therefrom—possesses. In the performance of this duty the Commission certainly does exercise at least a quasi-administrative or legislative function as well as a judicial function,—a fact equally true in connection with the function of that Commission in prescribing and fixing rates for Railroads; and yet, in connection with the performance of its duties relative to the establishment of Railroad crossings, the Supreme Court of Virginia has said, that the Commission is **not only a "court", but "a court of record".**

> **"In hearing and deciding the question in controversy between the litigating Railway companies, the Commission was acting in its capacity as a court of record, and, by the express terms of clause 23 of Section 1313-a, of the Code of 1904 (Acts 1902-3-4, pages 137 and 143), it is provided that, when so acting, the Commission shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of this Commonwealth."**
>
> **N. & W. R. R. Co. vs. Tidewater R. R. Co.,** 105 Va., 131.

But, if it should be said that the mere calling of the Commission a "court", does not make it a court, then we reply that, regardless of the name given to this tribunal, no one can possibly read the powers and duties imposed upon it, and the method of procedure prescribed for it, by the Constitution and laws of the State of Virginia, as set forth in the defendants' Answers in these causes and Exhibits filed therewith (Rec. pp. 79 and 81 to 115) without seeing clearly that, irrespective of any name or designation which may be applied to this tribunal, it is, to all intents and purposes, in substance and effect, in truth and in fact, both a "court" and a judicial "court of record". It is not deemed necessary to quote here the constitutional and statutory provisions referred to, because they are already in the record, as Exhibits to the defendants' Answers, and in a form as accessible and convenient to the court as if repeated here in the body of this note.—Rec. pp. 81 to 115.

From these constitutional and statutory provisions, it will be seen that the Virginia State Corporation Commission is clothed with all the powers and endowed with the full nature of a typical judicial court of record, although, **like every other court in Virginia, since the foundation of the government,** it possesses certain powers and functions which are non-judicial in their nature.

The Commission **sits in a fixed and public place.**

It **keeps a written public record of its proceedings,** which has all the characteristics of an ordinary court record.—See Rec. pp. 120 & seq;

It **issues its own writs and processes,** and has them **served by its own officer, and enforces them by its own executive processes and not otherwise;**

It can, by and under its own process, **compel the attendance and testifying of witnesses,** and the production of documents.

It can enter no order nor make any valid regulation against a carrier or other person, without **first citing** it or them to appear, giving it or them a **full hearing,** and otherwise proceeding by **due process of law;**

It is **expressly given all the powers of a court of record;**

It can **impose fines, and render and enforce, by its own executive process, judgments** therefor, which are recordable and

become liens upon the property of the judgment debtor, like judgments of the ordinary courts;

It can **issue and enforce writs of mandamus and injunction;**

It can **punish for contempt,** and can, and is required to, enforce all of its own judgments, orders and decrees by **its own executive process,** and not otherwise;

None of its judgments, orders or decrees may be disregarded, enjoined, attacked or reviewed (except for lack of jurisdiction, as in the case of ordinary courts) in any other court of the Commonwealth, **except in the Supreme Court of Appeals, upon appeal;**

It cannot sue or be sued, nor in any wise appear as a suitor in any tribunal;

Writs of mandamus and prohibition may be issued to it by the Supreme Court of Appeals;

In short, there is **not a single distinctive characteristic of a regular judicial court of record which the Virginia Corporation Commission does not possess** under the Constitution and laws of the State.

From the foregoing, it would seem that there could be no doubt, from an inspection of the Constitution and laws of Virginia, that the Corporation Commission of that State is, in the strictest sense, a judicial court of record, but, so far as these appeals are concerned, that question is conclusively set at rest by the construction and interpretation of said Constitution and laws by the highest Court of the State of Virginia, which Court has, by explicit and repeated decisions, held that the Corporation Commission of that State is, in the strictest sense, a judicial court of record.—See Post p. 1414 [illegible]

B.

APPEAL FROM THE COMMISSION.

(1.) The Constitution and laws of Virginia provide, explicitly, that the carrier, or the Commonwealth or any party affected may have an **appeal, as of right,** from any order or ruling of the Commission, in a rate making proceeding, to the Supreme Court of Appeals of the State, and that such an appeal shall be **heard only upon the record** made up before the Com-

mission. See Virginia Constitution, Sec. 156, Sub-sections (d) and (f).—Rec. pp. 87 and 88.

Such an **appeal**, by, and of, itself, **imports a judicial proceeding**, and, in the nature of things, is obviously inapplicable to a legislative or administrative proceeding.

(2.) So careful was the Constitutional Convention, which framed this enactment, to prevent the possibility of injustice to a carrier, that it provided, in addition to the right of the parties under the ordinary rules applicable to cases of surprise, mistake or fraud, that the appellate court should have the free and untrammeled right and discretion to **remand the cause to the Commission (before disposing of the appeal) for further evidence** whenever, in the opinion of the appellate court, the "interests of justice" demand it.

(3.) **An appeal**, however, **is not a new case**, but, **ex vi termini**, imports the **pre-existence of the same case in the tribunal appealed from**, the appeal being necessarily a mere **continuation** of the original suit.

Cohens vs. Virginia, 6 Wheat. 409 & seq.

Nations vs. Johnson, 24 How. 204-5.

There can surely be no question as to the **Supreme Court of Appeals** of the State being a **judicial court** of record in the strictest and fullest sense. When an appeal is actually pending in that court from a ruling of the Commission prescribing rates of charge,—as was the case in Atlantic Coast Line, &c. vs. Commonwealth, 102 Va., 599, an appeal from an order of the Commission prescribing demurrage rates; and, in Norfolk &c. Co. vs. Commonwealth, 103 Va. 289, an appeal from an order of the Commission prescribing car weighing rates—when **such an appeal** is actually pending in the Supreme Court of Appeals, no one can question its being, **in the strictest sense, a judicial case**, in a judicial court, the proceedings **in which the Federal Circuit Courts are prohibited**, by Section 720 of the Revised Statutes, **from enjoining**.

If, therefore, the proceeding is a judicial cause when it gets into the Supreme Court of Appeals after appeal, then, **ex necessitate**, it must have been equally a judicial cause, while before the Commission **before the appeal**. This is but another **demonstration of the fact that the Commission is**, in truth and in fact, **a court**.

(4.) As illustrative of the **utter unworkableness** of Appellees' theory of the right of a Federal Circuit Court **to** intervene, **right in the midst of these proceedings** between the nisi prius decision and the appeal, and, (enjoining the nisi prius tribunal from enforcing its decree) "sweep the subject-matter of the litigation * * * within the jurisdiction" of itself—to use the language of the Court in Reinach vs. Atlantic, &c. Co., 58 Fed. Rep. 44—we say, as illustration of the utter unworkableness of such a theory, let us take the case of an order of the Commission prescribing a given rate which is **acceptable to neither the carrier nor the Commonwealth**. It is by no means extraordinary that both parties are dissatisfied with a decision. The Constitution expressly gives a right of appeal both to the Commonwealth and to the carrier (Va. Const., Sec. 156, subsection (d)—Rec. p. 87); now, suppose the dissatisfied carrier should apply to a Federal Circuit Court for an injunction against the Commission's order, as was done in these cases, and, at the same time, the Commonwealth should apply to the State Supreme Court of Appeals for an appeal from the same order, as was done by the carrier itself in the two rate cases above named of Atlantic Coast Line &c. vs. Commonwealth, 102 Va. 599, and Norfolk &c. Co. vs. Commonwealth, 103 Va. 289. The result of such a proceeding would be that the same identical proceeding would then be at the same time pending in the Federal Circuit Court on injunction proceedings, and, in the State Supreme Court upon appellate proceedings.—an absolute impasse.

C.

ELECTION BETWEEN STATE AND FEDERAL REMEDY.

The appellees lay great stress upon the doctrine, referred to by this Court in

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 391.

that while a State may provide for a remedy in its own courts, it **cannot deprive a person of his right to elect the Federal court as his forum**; in other words, that the right to resort to a Federal court for relief is not dependent upon the suitor's inability to obtain the same relief in a State court.

No proposition could be clearer or more firmly established

than this and it is most freely admitted to be correct, yet it has not application to this case.

While it is beyond question that when both Federal and State courts have jurisdiction to decide a matter, and **the jurisdiction of neither tribunal has yet been invoked,** then the State cannot by any law of its own deprive a suitor of his right to elect the Federal court as his forum; but when **the State tribunal has first taken jurisdiction of the matter,** the case is wholly different, and its jurisdiction cannot be ousted by then applying to the Federal court, except in cases for removal of which we have shown this is not one. This proposition must be regarded as equally clear and as firmly established as the right of election above referred to.

Now, as pointed out above, the rate-making proceeding, involved here, is a judicial proceeding originating in the Corporation Commission and terminating, on appeal, in the State Supreme Court of Appeals, or in this honorable court itself, and that, from its origin in the Commission to its termination in the Appellate Court of last resort, **it is one and the same, continuous, proceeding**—Cohens vs. Virginia, 6 Wheat, 409 & seq. It is clear then that the State tribunals having jurisdiction in the premises, had already taken cognizance of the matter and proceeded to hear and dispose of it, before the Federal Circuit Court was applied to.

It is obvious, that in such case, **there is no question of election involved.**

D.

A COURT QUOAD HOC.

But, it may be objected that the prescribing of rates is a legislative function and, therefore, that this Commission, charged with the execution of that legislative function, cannot quoad hoc, be regarded as a court. To this we make two replies:

(1) Assuming that the prescribing of a rate is necessarily a legislative function, yet the fact that a court may have imposed upon it extra judicial powers or duties, does not destroy its character as a "court". With the possible exception of the State of California, it is believed that there is no State

court in the United States—and certainly there is none in the State of Virginia—which has not had imposed upon it, from time out of mind, more or less duties and functions, which are not strictly judicial. Yet, it has never entered into the mind of man to suggest that these tribunals cannot be called "courts" merely because they have to perform certain functions which are not strictly judicial. The fact that State courts have many functions that are not strictly judicial is so universal, and has existed for so long, that it cannot be conceived that it was unknown to the authors of Section 720 of the United States Revised Statutes. And yet, the authors of that enactment did **not** say that,

> "**A writ of injunction shall not be granted by any court of the United States to stay proceedings of a judicial nature in any court of a State,**"

but the prohibition was made applicable to **all** proceedings in **any** court of a State.

(2) Again assuming that the prescribing of a rate is necessarily a legislative function, then, it follows that, in exercising the rate-making power, **two** distinct functions are to be performed, that is to say, the **legislative** function of deciding on the wisdom and propriety of the rate, and the **judicial** function of deciding upon its justness and reasonableness. So long as a rate is not low enough to be confiscatory, it it a matter of **legislative discretion** as to how high or how low it should be; but as to whether a proposed rate is so low as to be confiscatory, is a **judicial question,** which must be disposed of in a judicial manner by "due process of law". As to **which one** of these functions shall be **performed first,** with reference to a contemplated rate is not of the essence of the matter, but merely a question of practical convenience; and a State can, in its discretion, direct that the reasonableness of a proposed rate shall be judicially determined **before** its wisdom and propriety shall be legislatively acted upon, or vice versa; and the rights of a carrier cannot be said to have been invaded in one case, any more than in the other.

In the State of Virginia, the people, by their Constitution, have decided that, (for reasons of convenience and practical efficiency,) of these two functions, the **judicial function** of determining the reasonableness of a rate **shall be performed before the legislative function** of prescribing the rate is performed; and, in like manner, and for the same reasons, they have decided that **both** these functions shall be performed **by the same tribunal**, rather than by separate and independent tribunals. But, let it be observed, that, in doing these things, the Constitution and laws of that State have been most careful and particular to prescribe that the Corporation Commission, in performing the judicial function of determining the reasonableness of a rate, which, if decided in the affirmative, that same body may, later on, perform the legislative function of prescribing,—that, in the performance of this judicial function, this Commission shall be **clothed with the identical powers and restricted to the identical procedures that any other court of justice would be subject to** in performing, separately and independently, the same judicial function; and, from the action of the Commission in the performance, as a court, of this judicial function, an appeal is provided to the Supreme Court of Appeals of the State, just as an appeal would have been provided from the similar act of any other nisi prius judicial tribunal or court. On such appeal, the **Court of Appeals cannot consider the legislative question of the wisdom or propriety of a rate prescribed by the Commission, but only the judicial question of its reasonableness,** and any other judicial questions connected with the proceeding, such as the sufficiency of the notice, the admissibility of evidence, the existence and effect of any alleged contract of the State affecting its right to regulate the rates of the carrier involved, &c.

From this, it will be seen that, while the Commission, in the course of its proceedings involved in this litigation, performs **both** a legislative and a judicial function, yet, it is **only its action upon the judicial questions involved that can be reviewed on appeal** or, under any circumstances, reviewed by the highest court of the State; and that, quoad that action of the Commission,—that is, its decision upon the **judicial** question of the reasonableness of the rate, and upon the other

judicial questions involved—such Commission is none the less a "court" in every sense, and particularly within the true meaning and intent of said Section 720 of the United States Revised Statutes, merely because there is conferred upon it an additional legislative function with which neither this court nor any other court can have anything to do.

In every State, where the Federal courts have granted injunctions in proceedings to review the actions of the local Railroad Commissions on the question of the reasonableness of a prescribed rate, such injunction could have been granted, and such proceedings could have been maintained, just as well in the State courts of such State, as in the Federal court having jurisdiction thereon. In other words, the Federal courts, in such cases, undertook and exercised **no other jurisdiction whatsoever than that which could have been undertaken and exercised by the State courts of such State**—the Federal courts having (under Section 2, Chapter 37 of the Code of March 3rd, 1875) **concurrent jurisdiction** in those respects with the State courts. As further accentuating and illustrating the essential difference between the situation in Virginia and that which exists in all of the other States, attention is called to the fact, that such is the distinguishing characteristic of the Virginia Commission as a court of record, that it is expressly provided in the **Constitution** of that State that,

> "**No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeal, as hereinbefore authorized) shall have jurisdiction to review, reverse, correct or annul, any action of the Commission, within the scope of its authority, or to suspend or delay, the execution or operation thereof, or to enjoin, restrain, or interfere with the Commission in the performance of its official duties.**"
>
> **Virginia Constitution**, 1902, Section 156 (d). Rec. p. 87.

Thus, it will be seen that, if the jurisdiction exercised by the Circuit Court below should be sustained, that court would not be exercising (as in other States) a jurisdiction **concur-**

rent with the courts of the State, as authorized by the Federal statute; but would be exercising a jurisdiction which, **under no circumstances, could be exercised by any State court,**—the Constitution of the State prohibiting any interference, by way of injunction or otherwise, with the proceedings before the Corporation Commission of Virginia by any other court whatsoever, of that State, except the Supreme Court of Appeals, and permitting interference even by that court only by way of appeal, in the manner provided by law. This is mentioned in further illustration and **demonstration** of the fact that the State Corporation Commission of Virginia is, **in every sense a "court"**—called such, made such, and treated as such, by the laws of that State.

E.

COMMISSION DISTINCTLY AND REPEATEDLY HELD TO BE A COURT.

From what has already been set forth in this chapter, it is respectfully submitted that, regarding the question as res integra, there could be no doubt that the Virginia Commission is a judicial court, both generally and quoad hoc its rate-making functions; but **this is no longer an open question**, seeing that this honorable Court will always accept the interpretation of a State Constitution or statute placed upon it by the **highest Court of the State itself**, which, in this case, **has repeatedly held the Virginia State Corporation Commission to be a court**, and expressly in the exercise of its rate-making functions, as the following extracts from decisions of the Virginia Supreme Court of Appeals will fully show:

> **"In hearing and deciding the question in controversy between the litigating railway companies the Commission was acting in its capacity as a court of record."**
>
> **N. & W. R. Co. vs. Tidewater R. Co.**, 105 Va. 131.

> **"The Corporation Commission, * * * created, as it manifestly was, to procure from pub-**

lic service corporations better service for the public, and to that end having the powers and authority of a court of record, * * ."

Newport News, &c., Co. vs. Peninsula, &c. Co., 59 S. E., 1099.

"The Constitution of Virginia, in Section 156 c, provides, as to the Commission, that 'in all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record', &c. This section gives the commission, in the exercise of its judicial functions authority to administer oaths, compel the attendance of witnesses, enter up and enforce its judgments, and confers upon it other ordinary attributes of a court of general jurisdiction. In all matters 'within the jurisdiction of the Commission', says the Constitution, employing the word jurisdiction which is appropriately used with reference to a judicial tribunal as distinguished from legislative or administrative authority. The Commission, by Section 156 b, has conferred upon it the legislative authority to fix and prescribe rates and classifications, and to make regulations for transportation and transmission companies to the full extent to which that power exists in the State government. But in the exercise of this legislative power it cannot make its rates effective or put its regulations into force until it has summoned the company or companies to be affected before it. This is done by notice which affords due process of law to the company. The hearing or investigation upon that notice gives to the final action of the Commission the force and effect of a judgment of a judicial tribunal. Passing upon the reasonableness

of rates and classifications to be prescribed by it and of regulations, orders and requirements to be promulgated by it—in the exercise of its legislative authority—constitute the principal matters 'within the jurisdiction' of the Commission (as a judicial tribunal) as outlined by the Constitution.''

Commonwealth vs. Atlantic Coast Line R. Co., 106 Va. 61.

SEE ANTE, P 94 & SEQ **F.**

PRECEDENTS.

The following cases are sufficiently analogous to those involved in these appeals to serve as pertinent illustrations of the practical application of the Rule laid down in **Section 720 of the Revised Statutes, forbidding Federal** Circuit **Courts to enjoin proceedings in a State court,** even though the function being exercised in such proceedings might properly be classified as **legislative rather than judicial.**

(1) In the case of **Rensselaer, &c., Co. vs. Bennington, &c., Co.**, it appeared that, by a statute of the State of Vermont, the Bennington Railroad Company was authorized to operate its trains along and over a part of the Rensselaer Railroad, subject to such reasonable rules and regulations as might be established by the Rensselaer Railroad; provided, however, that, if the latter company failed to establish such rules and regulations within thirty days thereafter, then, the **Supreme Court of that State might, upon application of the Bennington Road, prescribe and enforce such rules and regulations.**

It will be observed that the fixing of a maximum passenger rate is nothing more nor less than prescribing a ''rule or regulation'' of exactly the same nature legally as any other rule or regulation for the operation of the company. If the prescribing of rates is a legislative function, then the prescribing of any other regulation is equally a legislative function. Thus, we have in this case, an instance, in the staid and ultra-conservative State of Vermont, of the power being **conferred upon an ordinary court** of performing the legislative function of prescribing regulations and rules for a railroad company.

The Rensselaer Railroad failed to prescribe rules and regulations, and, thereupon, the Bennington Road applied to the Supreme Court of Vermont to have said court itself prescribe rules and regulations, as specified in the statute. Thereupon, the Rensselaer Railroad, claiming that the statute in question was illegal and void, **applied to the United States Circuit Court for Vermont to enjoin the said proceedings in the State court for the prescribing of said rules and regulations.** The court, however, refused the injunction, saying:

> "**The prosecution of those proceedings [in the State court] or the carrying out of such order or decree as the Supreme Court may make upon them, must be restrained, if anything effectual is to be done, in this case. The restraint of the execution or complete fulfilment of proceedings of a judicial nature is, in effect, the same as the restraint of the proceedings themselves. In Section 720, Rev. St., it is provided that the writ of injunction shall not be granted by any court of the United States, to stay proceedings in any court of a State, except when authorized in bankruptcy proceedings. This provision of the statutes is strictly applied whenever the restraint of any independent proceedings, such as a State court, is attempted. * * * The rights of citizens of other States to have their litigation generally, and the rights of all to have Federal questions, tried in the Federal courts, are provided for by the statutes relating to the removal of cases from the State to the Federal courts, and the writs of error from the Supreme Court of the United States to the highest courts of the State, and are not left at all to be effectuated by injunctions from one court to the other. This conclusion renders the examination of the constitutional question here unnecessary, and, in fact, improper. For this reason, the bill cannot be entertained.**"

Rensselaer, &c., Co., vs. Bennington, &c., Co.,
18 Fed. Rp., 617.

It needs no comment to show the exact analogy between the principles involved in this Vermont case and the principles involved in the cases covered by these appeals.

(2) In an interesting case which came before this honorable Court, in 1887, the principle forbidding the enjoining by Federal courts of proceedings in State courts, was **applied to a State tribunal which, strictly speaking, could not be classed as a judicial tribunal at all.**

The facts, in brief, were these: The **municipal Council** of the City of Lincoln, in the State of Nebraska, adopted an ordinance authorizing one of its committees to inquire into charges of dishonesty preferred against the Police Justice, and, to pass upon such charges. The committee did this; and found the Police Justice guilty of the charges,—a finding which would involve his removal from office. The matter was then reported to the Council, who fixed a day for taking a vote upon the report and threatened and declared that they would then "without hearing or reading the evidence taken before the committee, declare the office vacant and appoint another person to fill it". In addition to this, it appears that the ordinance under which this committee had acted was passed after the commission of the acts constituting the alleged offense. At this stage, Parsons, the Police Justice, applied to the United States Circuit Court for an injunction to restrain the Council from proceeding further in the matter of the charges against him, on the ground that the said ordinance was an ex post facto law. The injunction was granted by the Circuit Court; but, upon appeal to this Court, it was declared that the **Circuit Court was without jurisdiction to grant the injunction, and that, therefore, all proceedings had in that case were void.** Some question was raised as to whether the proceedings before the Council were of a criminal, or quasi-criminal nature, and, therefore, beyond the interference of a court of equity. This Court, however, declined to base its judgment solely upon this point, but said:

> "If those proceedings are not to be considered as criminal or quasi-criminal, yet, if, by reason of

their form and object, and of the Acts of the Legislature and decisions of the courts of Nebraska as to the appellate jurisdiction exercised in such case by the judicial power of the State they are to be considered as proceedings in a court of the State (of which we express no decisive opinion), the restraining order of the Circuit Court was void, because in direct contravention of the peremptory enactment of Congress that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except when authorized by a bankrupt act. * * * If a person * * * is, by by the judgment of a court of the State * * * denied any rights secured to him by the Constitution of the United States, he can obtain relief by writ of error from this court. [United States Supreme Court]. * * * Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court."

In re Sawyer, 124 U. S. 219.

Finally, in the case of **Fitts vs. McGhee**, in 1898, it appeared that a statute of Alabama arbitrarily reduced the tolls on a bridge and provided a penalty for collecting greater tolls. The toll collector disregarded the law, and, accordingly, steps were taken in the State court to inflict the penalty upon him prescribed by the statute. Thereupon, the defendant applied to, and obtained from, the United States Circuit Court an injunction restraining the proceedings in the State court on the ground that the statute reducing the tolls was unconstitutional and void, and that the proceedings in the State court was an

attempt to deprive the plaintiff of rights under the Federal Constitution. On appeal, however, to this Court, **the injunction was dissolved for lack of jurisdiction,** that court saying that the proper way to raise the question of the constitutionality of a statute was not by injunction, but by setting up the unconstitutionality of the statute in the State court by way of defense and appealing therefrom if the defense be not supported. The court said:

> "**The plaintiffs state that the toll-gatherers in their service had been indicted in a State court for violating the provisions of the act of 1895 in respect of tolls. Let them appear to the indictment and defend themselves upon the ground that the State statute is repugnant to the Constitution of the United States. The State court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. And, if the question is determined adversely to the defendants in the highest court of the State in which the decision could be had, the judgment may be re-examined by this court upon writ of error. * * * The accused should have been left to be dealt with by the State court, with the right, after the determination of the case in that court, to prosecute a writ of error from this court for the re-examination of the final judgment so far as it involved any privileges secured to the accused by the Constitution of the United States.**'

G.

CORRECTION OF RATE BY APPELLATE COURT.

Appellees have criticised the provision in the State Constitution requiring the **State Supreme Court,** upon an appeal from the Commission, to, itself, **correct a rate** found by it to be unreasonable.—See Va. Constitution, Sec. 156, sub-section (g) —Rec. p. 89.

There is, however, nothing illegal or impracticable in this provision.

For reasons, hereinbefore referred to, it might be said that "**time is of the essence of rate-making**", for the facts and circumstances which constitute the occasion and justification for a given rate are liable to change. Hence it is of prime importance that every unnecessary cause of delay in the proceedings for making a rate be removed so far as it can possibly be done without detriment to any real or substantial right of the carrier. It is for this reason that the unnecessary occasion for delay by the appellate court's sending a cause back to the Commissioners to correct an order fixing a rate, which the appellate court could just as well correct, itself, was avoided by **requiring** the appellate court to make the correction.

Under the machinery which has been usually employed heretofore, this state of affairs has not infrequently resulted where the carrier itself initiated the rate: Let us suppose a rate, which should properly not exceed fifty cents, has been fixed by the carrier. After passing through the various stages required by previous rate-making machinery, the court, to whom has been submitted the sole question of the reasonableness of the one dollar rate, and which, in arriving at its conclusion that that rate is unreasonably high, must have ascertained what **is** the real line or limit of reasonableness, is precluded from doing more than enjoining the dollar rate, whereupon the carrier promptly puts in a rate of ninety-nine cents, and the whole proceedings have then to be repeated in order to effect another reduction of a cent or half cent, when the court has all along ascertained that a fifty cent reduction is what is required by law.

Now, mutatis mutandis, the case is the same where the Commission, rather than the carrier, makes the rate, and its reasonableness is reviewed on appeal. The entire testimony being before the appellate court, it is just as practicable for that tribunal to ascertain what is the nearest legally permissible rate to that fixed by the Commission as it is to determine that the rate fixed by the Commission is not legally permissible,—and having determined it, there is no good reason why that court may not be given the power and duty to declare it in its

decree. Thus, the appellate court, having determined that a rate, fixed by the Commission and appealed from, should be increased twenty cents in order to bring it within the limits of reasonableness, there is nothing impracticable or illegal in that court's saying so, and **fixing the rate** at twenty cents more than it was fixed by the Commission, rather than merely condemning the rate as illegal (without an intimation of what the court would regard as reasonable upon the evidence) and sending the case back to the Commission to **make another guess** at what the appellate court would regard as reasonable.

It is a well established jurisdiction of common law courts to compel carriers to refund charges in excess of what was reasonable; this was **no more nor less than for the court**, in a case attacking a rate as unreasonably high, to decide what is a lawful rate and compelling the carrier to refund the difference.

At any event, if the State chooses to make its Supreme Court of Appeals a rate-making body, under certain circumstances, with full opportunity to the carrier to introduce in the record (as is given to it by Virginia laws) every particle of evidence that it may desire, the carriers' rights are in no way invaded, and it has nothing of which it can complain, seeing that it has full right to appeal to this honorable court from any rate so fixed by the Virginia Supreme Court, and that the record, upon such appeal would contain every particle of the evidence which the carrier might desire to be considered or which it could have introduced in a Federal Circuit Court or any other tribunal.

Of course, when the appeal comes to this honorable court, it is not affected by the provision of the Virginia Constitution, addressed only to the Supreme Court of that State, requiring it to fix the proper rate when condemning another as improper; and this court will proceed to dispose of the appeal according to its own methods of procedure exactly as if the rate was one which had been fixed by an ordinary non-judicial railroad commission, and had been attacked in, and confirmed by, the courts of the State.

H.

SUPERSEDEAS.

The sole ground upon which injunctions against State-made rates have been sought or obtained has been that the rate was **made effective before its validity could be judicially tested.** See **Reagan vs. Farmers Loan & Trust Co.**, 154 U. S. 394. One of the chief purposes of the **Virginia** rate-making machinery and its necessary effect is to make it impossible for a State-made rate to become effective, or any penalties thereunder to be incurred, **until** its validity in every respect can be judicially tested by the carrier, or any person interested, in the highest tribunal to which they may choose to carry it, including this honorable Court.

In the first place, the reasonableness and legal validity of the rate is judicially considered by the **Special Court,** called the State Corporation Commission; but after that nisi prius court has passed upon it, the carrier may appeal to the highest court of the State, and obtain a **supersedeas** suspending the operation of the rate "until the final disposition of the Appeal". **Virginia Constitution,** Sec. 156, Sub-sec. (e)—Rec. p. 87. If not satisfied with the result of that appeal, a further appeal may be taken, on any Federal question involved, to this honorable court which, of course, may also issue a supersedeas to the decree appealed from.

Thus, it will be seen that, under the rate- making machinery of Virginia, **no carrier is exposed** to the dangers existing in other States, of **incurring penalties,** while testing the validity of a rate, but, on the contrary, pending such test, **the rate is suspended and no penalties can accrue.**

Appellees seek to avoid the effect of this by insisting, first, that the granting of the supersedeas is merely discretionary with the Supreme Court of Appeals, and, second, that the condition of the supersedeas bond is impossible. Neither one of these propositions, it is submitted, can be sustained.

(1)

The Constitutional provisions in question are as follows:

"(d) **From any action of the Commission prescribing rates * * * or refusing to approve a suspending bond or requiring additional security thereon or an increase thereof, * * * an appeal * * * may be taken by the corporation whose rates * * * are affected * * * such appeal shall be of right. * * * All appeals from the Commission shall be to the Supreme Court of Appeals only".**

"(e) **Upon the granting of an appeal, a writ of supersedeas may be awarded by the Appellate Court, suspending the operation of the action appealed from until the final disposition of the appeal."**

Va. Const., Sec. 156, Sub-sec. (d) and (e),—Rec. p. 87

Even if the granting of this supersedeas were discretionary with the Supreme Court of Appeals, it is not to be assumed that that high and honorable tribunal would so far and so grossly abuse such discretion as to refuse a supersedeas in a rate case. But, as a matter of fact, the **granting of such a supersedeas** is not discretionary, but is **mandatory,** it being well settled by the decisions of this Court, as well as of the highest court of Virginia, that the word "may", when used as in the enactment in reference to granting a supersedeas above quoted, means "must" or "shall", and is mandatory.

Supervisors vs. U. S., 4 Wallace, 445;

Ex parte Lester, 77 Va. 673.

(2)

It is insisted that the conditions of the supersedeas bond, as prescribed by the Virginia Constitution,—see Va. Const., Sec. 156, sub-sec. (e), Rec. pp. 87-8,—are impossible of performance by the carrier.

(a)—No such point was made or hinted at in any of the

Bills or other pleadings in the cases. It is true that, **at the hearing** of the Rule to show cause, certain **affidavits were introduced** by appellees, setting forth what the affiants believed to be the impracticability of complying with the requirements of the Virginia law in reference to obtaining a supersedeas; but, as **no such matter** had then, or has since, been put **in issue** by the pleadings, the appellants offered no counter proof, and are advised and insist that said affidavits cannot be considered.

(**b**)—Regardless of the affidavits in question, it must be clear to the court, even upon slight reflection, that there is no impossibility nor impracticability in complying with the provisions of the Virginia laws in reference to the supersedeas —see Va. Const., Sec. 156, Sub-section (e), Rec. pp. 87-8—and that all the obstacles and difficulties set forth in said affidavits are purely imaginary. For instance, the alleged impossibility of obtaining or recording the name and address of the passenger. In the **first** place, this being for the passengers own benefit, in order that he may recover back the overcharge, it is not to be supposed that he will refuse to give his name and address. In the **second** place, it is to be assumed that the law will be administered reasonably, and that no supersedeas, involving thousands of dollars to the carrier, will be dismissed because some bad-tempered, silly or cranky passenger should refuse to give his name to the conductor or ticket agent—**a** thing which, at most, would be of very rare occurrence. In the **third** place, if the law should be subject to such a strict, narrow and harsh construction, the carrier would clearly be justified in refusing to transport any passenger who refused to give his name and address. And, **finally,** in regard to the alleged impossibility of writing down the name and address of a passenger—such a contention cannot, for a moment, stand in the face of the notorious fact that the carriers have for years, of their own free will, imposed all sorts of similar regulations upon the use of their mileage books and special tickets, requiring the passenger not only to give, but to sign, his name to such tickets, and to repeat his signature whenever called upon by a conductor to do so, and even to go through various other processes of identification:—for the carrier now to pretend that it is practically impossible for its servants, on small

slips or strips, to write down the name and address given by a passenger, when selling him a ticket or collecting his fare, cannot be supported.

(c)—But the whole matter is **conclusively** put at rest by the fact that, in these very cases, and in each of them, the carriers voluntarily offered, and were afterwards required by the Circuit Court below to do, and most readily and easily did do, practically the **identical same thing, to maintain the injunction in force, that the Virginia laws required of them, in order to keep a supersedeas in force.**

Thus in the Bills it was prayed,

> **"That there may be, and shall be, adopted herein a proceeding analogous to that provided by Sub-section (e), of Section 156, of the Constitution of Virginia, namely," &c. Rec. p. 18.**

And, accordingly, the Court did order the appellees to do, as a condition for maintaining the injunction in force, substantially the same thing required by the Virginia law as a condition for maintaining a supersedeas in force—Rec. pp. 64, 166 and 175-6—which was cheerfully complied with by the carriers, who, therefore, accomplished, by their injunctions, exactly what, and **only what, under the Virginia laws, they would have accomplished by supersedeas,** and on practically the same identical terms.

It thus being clear that, under the Virginia laws and the proceedings which were then pending before the Corporation Commission, there was **no possibility of the rates going into effect** or of penalties accruing thereunder **till the fullest judicial inquiry as to their reasonableness had been prosecuted** as far as the carriers chose, even up to this honorable court itself, it follows that there was **absolutely nothing to be gained** for the carriers by the resort to the Federal Circuit Court, **except the delay** necessarily resulting from having to repeat the identically same investigation and hearing, which had consumed nearly a year's time before the Commission, and covered many thousand pages of evidence, and also the possibility that a single Master in Chancery, wholly unfamiliar with railroad rates, might come to a different conclusion from the three Commis-

sioners, who were specialists of large knowledge and long experience in such a highly complicated matter.

It is submitted that the law does not recognize the accomplishment of such objects as entitled to its protection or encouragement, and certainly such objects do not cover any rights secured to the Appellees under the Federal Constitution.

I

PROCEEDINGS TO ENFORCE RATES.

The Court's **attention is particularly called** to the method of **enforcing rates** made by the Virginia Commission.

In all other States, with which the writer of this note is familiar, the rates are enforced by proceedings in court, instituted and prosecuted by the Commission, the Attorney General, or some other officer or Board; hence the propriety of enjoining the officer or Board which, but for such injunction, would, **as a suitor,** or in the name of the State, institute and prosecute the proceedings for the enforcement of the rate or the recovery of penalties for violating it.

In Virginia, however, **the entire theory,** as well as practice, is **radically and essentially different.**

(1)—As hereinbefore pointed out, the order of the Virginia Commission prescribing a rate is, in form, a **mandatory injunction,** ordering the carriers to charge not in excess of certain rates, therein specified, until the further order of the Commission; or, to use the language of the order itself—

> **"Except as otherwise allowed * * * from time to time, by the State Corporation Commission"—Rec. pp. 129, 130, 131.**

The going into effect of the order may be suspended by appeal and supersedeas, as hereinbefore pointed out; but, unless suspended, it becomes effective, upon the day therein specified, after its due publication as required by the law. Va. Const., Sec. 156, Sub-Sec. (b), Rec. p. 85.

The order is regarded and treated, in every respect, **like any**

ordinary order or decree in chancery, and the violation of it, after it becomes effective, is regarded and treated, to all intents and purposes, as a **contempt** and is so punishable by the Commission. ,

> **"In all matters pertaining to the public visitation, regulation or control of corporations and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record * * * to enforce compliance with any of its lawful orders or requirements, by adjudging and enforcing, by its own appropriate process, against the delinquent or offending Company * * * such fines or other penalties as may be prescribed or authorized by this Constitution or by law."**
>
> **Va. Const.**, Sec. 156, Sub-Sec. (e), Rec. p. 86.

Thus, it will be seen that there is no administrative function which the Commission has to perform, or can perform, in enforcing compliance with its orders prescribing rates. On the contrary, its functions in that respect are wholly and strictly judicial, **being exactly the same as those of any other court in enforcing compliance with its own orders or decrees.** That is to say, the Commission, just like any ordinary court, having the cause still pending before it, issues a rule—either upon motion or suggestion of some person interested or sua sponte—addressed to the offending company, requiring it to appear before the Commission, at a time and place named, and then and there to show cause, if any it can, why it should not be fined for violating the previous order of the Commission requiring it not to charge in excess of a specified rate.

Can any skill in reasoning, or stretch of imagination, make this out to be a legislative or administrative function, or, in short, anything else than a strictly technical **judicial function,** viz.: the enforcement by a court of obedience to its own orders?

This is the only way known to the laws of Virginia whereby a rate prescribed by the Commission can be enforced; and

yet this is what the injunctions in these cases prohibited the Commission from doing!

As hereinbefore pointed out (see Chapter X, sub-division II), it is just as much a violation of the inhibition contained in Section 720 of the Revised Statutes against enjoining proceedings in a State court, to enjoin such courts' proceedings **subsequent** to the decree and looking to its enforcement, as to enjoin its proceedings **prior** to its decree which look to its **entry.**

We respectfully submit, therefore, that for the lower court to have **enjoined the Virginia Commission in June, from taking any proceedings towards the enforcement of its own order entered in April, in a proceeding still pending before the Commission, and from which order an appeal of right lay to the Supreme Court of Appeals of the State, with absolute right of supersedeas, on substantially the same terms as those upon which the injunction was asked for and granted, was a palpable violation of the inhibition of Section 720 of the Revised Statutes.**

Such an error is **jurisdictional.**

Diggs vs. Wolcott, 4 Cranch, 179;

McKim vs. Voorhies, 7 Cranch, 279.

> **"The sole purpose of the bill in this case was to restrain the execution of an order of * * * a court of the State of Alabama, and no relief which, upon the averments of the bill, this court could grant, would be effectual without the writ of injunction prayed for. The Circuit Court of the United States was therefore deprived of power, by the section just quoted (sec. 720, supra) to protect the rights of the plaintiff, unless the writ of injunction was authorized by the law relating to proceedings in Bankruptcy."**
>
> **Sargent vs. Helton,** 115 U. S., 350.

(2)—As hereinbefore shown, a rate, made by the Commission and appealed from, may be suspended by supersedeas until the appeal has been finally terminated. But so tender

is the Virginia law of the rights of the carrier, that it is granted **opportunity for defense other than this,** as will now be pointed out.

While the order or decree of the Commission fixing a rate is appealable and enforceable, it is not a final decree in the sense that it ends the proceedings. On the contrary, **the proceedings continue to pend before the Commission,** for the purpose of **modifying** or changing the rate in the light of changing circumstances—which can be done on motion, by petition, or sua sponte—or for the purpose of enforcing obedience by the carrier to the order as made, which is a sort of continuing injunction.

As will be seen at the conclusion of each clause of the Order of April 27th, 1907, fixing rates, provision is made for future changes in, or modifications of, the Order by the Commission.—Rec. 129, 130, and 131; and this power to retain the cause and modify the rate order from time to time, as circumstances vary, was expressly recognized in the Virginia Constitution, which provided that it should not be affected by an appeal, which should deal only with the validity of the rate as of the time it was made.—Va. Const., Sec. 156, subsection (g), Rec. p. 89.

In regard to the proceedings which may be taken by the Commission for the **enforcement** of the rate, as hereinbefore set forth, a rule is issued, in the proceedings, against the offending carrier to show cause why it should not be fined for violating the rate; but it is expressly provided that (notwithstanding the proceedings in connection with the entering of the order fixing the rate and the ascertainment of its reasonableness) no fine or other penalty shall be entered or enforced against the carrier charged with violating the rate until

> "**After it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the Company for the alleged violation.**"
>
> **Va. Const.**, Sec. 156, Sub-sec. (e)—Rec. p. 86

Thus, upon proceedings of the Commission to enforce its order fixing rates, while the reasonableness of the rate as of the date of the order fixing it, is res adjudicata as to all carriers who were properly before the Commission in the proceedings which culminated in that order and did not appeal, and as to those whose appeal was not successful, yet any carrier charged with violating the rate can show

(a)—that it was not properly before the Commission in the said proceedings in which the rate was prescribed, and therefore had never had its "day in court" upon the question of the reasonableness of the rate as applied to itself; or

(b)—that, owing to facts occurring since the rate was fixed, such rate, which when fixed was reasonable, has since become unreasonable; or

(c)—that because of fraud, accident, surprise, or after-discovered evidence, it is entitled to have the question of the reasonableness of the rate, as of the time it was fixed, reopened and reheard on the same principle upon which it would be entitled to a rehearing or new trial in any similar or analogous proceeding in the ordinary courts; or

(d)—that the rate which it was charged with breaking, for any cause, had never, in fact, been legally fixed; or

(e)—that it had not in fact violated the rate as charged; or

(f)—any other thing going to show that the carrier is "not guilty", and should not be fined,—

We say that, upon a rule issued by the Commission, in the enforcement of its order prescribing a rate, requiring a carrier to show cause why he should not be fined for violating the rate, such carrier is, by the constitutional provision last above quoted, given the fullest opportunity to make any defense it may have,—save only that it cannot (except on the ground of after-discovered evidence or the like) question, in such a proceeding, the validity (as of the time of fixing it) of a rate theretofore fixed by the Commission in a proceeding to which such carrier was properly made a party, and from which it had not appealed.

To the Commission's rulings on matters arising in any such proceedings to enforce obedience to its orders fixing rates, there is full provision for appeal and supersedeas, as in case of any other of its rulings.

Thus, it will be seen that the fullest and most liberal provisions have been made by the Virginia laws for the amplest protection of every right a carrier has, or could assert in a Federal court or elsewhere; therefore, the State tribunal having taken jurisdiction of the matter, having heard it patiently for nearly a year,—the order in the passenger rate case being, by consent of all parties, based on the evidence in the freight rate case (which was begun in the spring of 1906), as well as that taken in the passenger rate case (Rec. p. 137)—and having rendered its decision (Rec. p. 132 to 165), and entered its order fixing the rates (Rec. p. 129 to 131), from which an appeal lies to the Supreme Court of Appeals, and thence, on any Federal question, to this honorable Court, with absolute right of suspension of the order appealed from till the final determination of the appeal—we say all these things being done, and the carrier being able to secure or protect no single right in the Federal Circuit Court for which it had not the amplest security and protection in the State courts, in the proceedings then and for a year past pending in the State courts, the Federal Circuit Court committed a jurisdictional, and certainly a reversible, error in enjoining the proceedings in the State Court, and "sweeping them all into the Federal Court."

See ante p 118

Chapter XIII.

RES ADJUDICATA.

It must be apparent that, by virtue of the proceedings had before the State Corporation Commission of Virginia, all of the matters and things involved in these suits are **res adjudictatae,** and can be re-opened only by the Supreme Court of Appeals of Virginia, or the Supreme Court of the United States, **on appeal.**

No other court in the United States has authority to review the proceedings had before the Commission.

The Commission was expressly and clearly vested with jurisdiction to **judicially** decide all the questions presented by the bills in these suits; its decision was expressly made final and conclusive, unless and until set aside or suspended by an appeal, which was to be granted as of right; no such appeal has been taken or applied for; the Commission did not proceed until it had given the required notice; all of these appellees appeared before it and submitted every iota of evidence they desired to present; and thereupon the Commission entered its order of April 27th, 1907.

By the Constitution of Virginia, the Commission was given jurisdiction of the subject-matter, and was required to **judicially** decide the questions involved. The Commission, undoubtedly, acquired jurisdiction of the **persons** who are complaining in these suits. Therefore, it is impossible to conceive of any foundation in law on which these appellees were entitled to maintain these suits.

The fact that various Railroad Commissions have been heretofore enjoined by the Federal Courts from enforcing rate regulations, can have no possible bearing upon the proposition for which we are now contending.

There can be no comparison between those Commissions and the State Corporation Commission of Virginia. Those Com-

missions were not required or authorized to **judicially** decide the questions of law involved in their rate regulations. They were empowered to **enact** a rate, but not to enter upon a **judicial** inquiry and decide as to its **reasonableness**, or to **enforce** such rate regulation **by their own process**.

It would be, indeed, a remarkable thing if these appellees, after exhaustively litigating before the Virginia Commission, sitting as a **judicial** body, (clothed with plenary judicial power by the State Constitution), practically every question which they now raise, could wholly ignore the **judicial** decision of those questions, made by that Commission, and, in another Court, retrace every judicial step taken by the Commission.

We have seen that the Virginia Commission is one of the Constitutional courts of that State,—that it is a "court", in every sense of the word,—and that its procedure was not only in accordance with "due process of law", but, also, that its order of April 27th, 1907, was a **judicial** determination of the proceeding here complained of.

That it acquired jurisdiction over the **parties** to that proceeding, no one can deny.

Its jurisdiction over the **subject-matter** cannot be questioned.

> "**The power to hear and determine a cause is jurisdiction; it is coram judice whenever a case is presented which brings this power into action.**" **Grignon's Lessee vs. Astor**, 2 Howard, 337.

In the case last cited, this Court further says, at page 343:

> "**When jurisdiction is once attached to a subject, or exists over a person, this court has adopted as a rule, applicable to all courts of record, that their decisions are conclusive; it has a right to decide every question which occurs in a cause, and whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court.**"

In the case of **Sargeant vs. State Bank**, 12 Howard, 384-5, this court announces the following necessary rule:

> "It is a principle well settled, too, in judicial proceedings, that whatever may be the powers of a superior court, in the exercise of regular appellate jurisdiction to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not acting in the exercise of appellate power. To permit the converse of this principle in practice, would unsettle nine-tenths of the rights and titles in any community, and lead to infinite confusion and wrong. In support of a principle so obvious and of such universal acceptation as is that just above stated, a recurrence to cases would seem to be wholly unnecessary."

And it is also clear that the doctrine stated above applies as well **to the most inferior courts**.—for instance, a justice of the peace.

In **Marsteller vs. Marsteller's Exor.**, 19 Atl., 344, the Supreme Court of Pennsylvania said:

> "It is quite enough that the question in controversy was submitted to a judicial officer, to be determined in a judicial way, that the parties and their proofs were heard, and their rights settled by a judicial determination."

Not only is this true, but the same doctrine applies, with precisely the same force, whenever, in accordance with law, a **board or an officer** is required to **judicially** determine a question. In other words, the doctrine is not, by any means, limited to what is **technically** called, or commonly referred to as, a "**court**". It extends as well to boards, commissioners and other officers, who are required to exercise even quasi-judicial functions.

In **Southern R. Co. vs. Wash. &c., R. Co.**, 102 Va. 490-1, the Virginia court held that the **Board of Public Works** of that State was authorized

> "to determine whether one railroad in this State shall be permitted to cross another; and it is also true that the adjudication of such a question by the Board is final and conclusive as to any question adjudicated by it, or which it was the duty of either party, interested in the proceedings before the Board, to have brought forward for adjudication."

It will be conceded that a **judge** is not a "court"; yet, in the case of Orleans vs. Platt, 99 U. S., 683, this Court applied the doctrine to an act of a **judge**, saying:

> "The county judge was the officer charged by law with the duty to decide whether the bonds could be legally issued, and his judgment was conclusive until reversed by a higher court."

An idea of the extent of the doctrine may be gathered from the following citations:

> "The rule which forbids the reopening of a matter once judicially determined by competent authority applies as well to the judicial and quasi-judicial acts of public officers and boards as to the judgments of courts having general judicial powers."
>
> 24 A. & E. Ency. of Law (2nd Ed.), p. 723.

In delivering the opinion in **Mercein vs. People**, (N. Y.), 25 Wend., 64; 35 Am. Dec., 653, 662, Paige, Senator, says:

> "I think the following rule will be found sustained by the cases, viz.: Wherever a final adjudication of an inferior court of record, or of an inferior court not of record, or of persons invested with power to decide on the property and rights of the citizen, is examinable by the Supreme Court, upon a writ of error or a certiorari—in every such case, such final adjudi-

> cation may be pleaded as res adjudicata, and is conclusive upon the parties in all future controversies relating to the same matter."

Again, in **Culross vs. Gibbons** (N. Y.), 29 N. E., 839, 841, the court said:

> "It is a well established rule that, where a matter has been submitted to an authorized judicial tribunal, its decision thereon is final between the parties until it has been reversed, set aside, or vacated, and the rule of res adjudicata applies to all judicial determinations, whether made in actions or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination."

See also, **People vs. Barnes** (N. Y.), 20 N. E., 609, holding, as to a board of town officers, that,

> "Their determination, * * * like the determination of all courts, is conclusive, until reversed or modified under proceedings by certiorari."

In **Brooks vs. Morgan** (Ind.), 76 N. E. Rep., 833, the court said:

> "The determination of the board of county commissioners in a matter in which it acts in a judicial capacity, where it has jurisdiction of the subject-matter and of the parties, is as binding upon the parties as are the adjudications of any other court. * * * A judgment of a court of competent jurisdiction is not void, unless the thing lacking, or making it so, is apparent on the face of the record. * * * The board of county commissioners is a court of record, and its acts can only be proved by its records."

"A board of county commissioners duly organized constitutes a court clothed with judicial functions, and ministerial duties, conferred by statute, and their final decrees until set aside, are to be given the same effect and degree of conclusiveness which generally attach to judgments of judicial tribunals. Smith vs. Boston, 1 Gray 72; Brewer vs. Boston, Clinton & Fitchburg R. R. Co., 113 Mass. 52; Plummer vs. Waterville, 32 Me. 566; Homer vs. Fish, 1 Pick. 435, 439, 11 Am. Dec. 218; Cooper vs. Reynolds, 77 U. S. 308, 19 L. Ed. 931. Whenever given authority to hear and determine matters submitted to them, the regularity of the proceedings, or the validity of the decision, if they made an error of law, can be inquired into only on certiorari, by which the entire record is brought up for examination. Foley vs. Haverhill, 144 Mass. 352, 353, 11 N. E. 554. Until thus reviewed, the record reciting and setting forth their action is conclusive upon the parties in interest, and not subject to impeachment by collateral attack, unless it appears that the board was without jurisdiction of the subject-matter, or the order made exceeded their statutory powers. Old Colony R. R. Co. vs. Fall River, 147 Mass. 455, 18 N. E. 425; Nichols vs. Boston & Maine R. R. Co., 174 Mass. 379, 54 N. E. 881; Ahearn vs. County of Middlesex, 182 Mass. 518, 520, 65 N. E. 905. Where precedent jurisdictional requirements are present, mere irregularities of procedure, or an erroneous decision on questions of fact, or of law arising upon evidence, cannot be reviewed, or corrected, in a suit founded upon their decree."

Bartlett et al. vs. New York Cent. & H. R. R. Co. (Mass.), 81 N. E., p. 204-5.

In a case before the Supreme Court of New Hampshire, the matter is quite fully treated in an able opinion, from which the following extracts are made:

"It is a general rule that a party to a judicial proceeding in which there has been final judgment on the merits cannot be compelled by the parties to that action to again litigate any of the matters that were there in issue, if the tribunal had jurisdiction of the parties to and the subject matter of the suit. * * * The rule depends upon 'the fundamental principle of the common law, that a matter once litigated and determined before a court of competent jurisdiction shall not again be controverted before any court'. MacDonald vs. Railway, 71 N. H. 448, 452, 52 Atl. 982, 984, 59 L. R. A. 448, 93 Am. St. Rep. 550. 'The doctrine of the conclusiveness of a judgment rests upon the consideration that the parties have once had a full and fair trial of the matter sought to be drawn a second time in question. One of the elements essential to such a trial is that they have reasonable notice of the question to be tried, and an opportunity to obtain and present all the evidence bearing upon it'. Metcalf vs. Gilmore, 63 N. H., 178, 188.

The controversy between Corron and the State was tried between the parties upon notice to Corron, and a finding was made against him. The cancellation of his license 'being for cause and after due hearing, the proceedings authorized by the statute are necessarily of a judicial character; and as the mode of procedure is not specified in the act, the substantial principles of the common law, recognized and enforced in proceedings affecting private rights, are to be observed'. * * * It has been repeatedly decided in this State that where an officer or a board is called upon to pass upon evidence and decide, their conclusion cannot be collaterally attacked, and that they are not liable to answer in a suit for their action. The reason given in the cases is that such action is judicial. * * *

"The fact that such officers or boards have also administrative power does not affect the validity of their judicial action. Of such a board the court in Indiana say: 'Boards of commissioners, under the law, in the discharge of their duties have, at least, a dual character. In some respects they act judicially, and the law regards them as a court. * * * In other respects they act in an administrative capacity. * * * When they rightfully exercise their powers as a court, it is settled by the authorities that they are to be treated as such, and their judgments rendered, or orders made, cannot be collaterally impeached, and the principles of former adjudication are applicable thereto'. * * *

"If the functions of the commissioners in passing upon the question litigated before them by the State and Corron were judicial, the same result must follow as would attend similar action by any judicial body. If it does not, their action is not judicial. That such action by the commissioners is judicial has recently been decided by this court. * * *

"The rule of res judicata, or estoppel by verdict, must therefore apply to litigation unless such rule is restricted in its application to proceedings according to the course of the common law. Such is not the fact. * * *

" 'The wellnigh universal rule is that the judgment of a court of competent jurisdiction, whether it be a court of record or not, upon a point litigated between the parties, is conclusive in all subsequent controversies directly involving the same question. * * * It makes no difference whether that adjudication was in a proceeding according to the course of the common law, or summary in its character. It is quite enough that the question in controversy was submitted to a judicial officer, to be determined in a judicial way; that the parties and their proofs were

heard, and their rights settled by a judicial determination.' * * *

" 'The rule of res adjudicata applies to all judicial determinations, whether made in actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination'."

State vs. Corron, (N. H.) 62 Atl., 1050.

See also Cooper vs. Hunt, (Mo.), 77 S. W., 483;
Close vs. Huntington, (Kan.), 71 Pac., 812;
Longinette vs. Shelton, (Tenn.), 52 S. W., 1034.

In view of these authorities, and of the absolutely necessary and firmly-established doctrine which they enunciate, it seems impossible that the U. S. Circuit Court below had the right to decide the questions raised in the bills in these suits.

It is confidently submitted that all those questions are **res adjudicatae**, and that no tribunal can now pass upon them, save alone in a proceeding by way of **appeal** from the final judgment of the Commission, in the manner expressly provided by law.

Chapter XIV.

CONCLUSION.

A.

ANALOGY TO MASTER IN CHANCERY.

While the cases are by no means identical, yet, so far as protection for the rights of the carrier is concerned, there is a marked analogy between the relations of the Virginia Corporation Commission to the Supreme Court of Appeals of the State, and that of a Master in Chancery to an ordinary court, such as a Federal Circuit Court.

The carrier has the same rights and opportunity to introduce evidence before the Commission as before the Master, unless the proceedings before the Commission are more favorable to it.

In each case, the court (Federal Circuit or State Supreme Court) may send the case back for further evidence—to the Master in one case, and to the Commission in the other.

In each case, the merits of the case are passed upon by the preliminary tribunal—in one case the Master, **one man,** without experience in such matters; in the other case, the Commission, **three men,** of the highest experience in such matters.

In each case, this judgment of the preliminary tribunal is subject to review before it can be put into effect **in invitum**—in the one case by the Federal Circuit Court, composed of **one judge;** in the other case, by the Supreme Court of Appeals of the State, composed of **five judges.**

Finally, the **ultimate** appeal in each case lies to the **same tribunal**—this honorable Court itself.

In view of these facts, can it be said that the carriers' rights are so inadequately protected in the State courts, and under its rate-making machinery, that a Federal Circuit Court is jus-

tified in stopping the rate-making proceedings, already in progress and practically completed in the State courts, enjoining the State court from enforcing its own orders, and "sweeping the whole matter into the Federal Court"?

B.

ENJOINING A LEGISLATIVE ACT.

The Virginia Constitution provides that, before an order of the Corporation Commission fixing a rate can become effective, it must be published for four consecutive weeks, &c.—Va. Const., Sec. 156, sub-section (b) (Rec. p. 85). This publication was enjoined by the decrees appealed from in these cases.

Now, if the rate order be **a judicial act**, as we submit we have conclusively shown it to be, then the Federal Circuit Court is forbidden to enjoin it by Section 720 of the U. S. Revised Statutes:

But, if it be **a legislative act**, as Appellees insist, then the Federal Circuit Court was equally without jurisdiction to enjoin it.

McChord vs. L. & N. R. R. Co., 193 U. S. 494.

Appellees seek to avoid this dilemma by saying that the publication of the order treated as a legislative act is no part of its enactment; but attention is called to the fact that such publication is not like the ordinary publication of legislative enactments, which is directory merely, the validity of the enactment in no wise depending thereon. In the case here, the publication of the order **is essential to the validity of the order**, and, if it be treated as a legislative act, this publication is as much a part of its enactment, and is no more a ministerial act, which the courts can enjoin, than is the engrossing of a bill by the clerk of the House or Senate, or the several "readings" of a bill by the clerk of each House, under the Virginia Constitution.

With reference to the publication of a rate order, the Virginia Constitution expressly provides that, until such publication shall have been completed, the order shall not become effective—from which it appears that, at any time up to the final completion of the publication, the Commission, regarded

as a legislative body, may be regarded as having the whole thing still **in gremio**, and, by ordering the publication suspended or abandoned, can as completely kill the entire "enactment" as an ordinary legislative body can kill a bill at the last minute by refusing to engross it or ordering the enacting clause to be stricken out.

We respectfully submit, therefore, that, if the rate order involved here be regarded as a legislative act, the Federal Circuit Court was wholly without authority to enjoin its enactment by prohibiting its publication, as required by law.

C.

APPEAL OF COMMONWEALTH.

Appellees insist that the Commission, treated as a judicial body, is practically the plaintiff as well as the judge. To this we have replied in a former part of this note. We desire now, however, in addition to what we have already said on this point, merely to call attention to the fact that, under the law, the Commonwealth is not only required to be the plaintiff, but is given the right to appeal from the decision of the Commission to the Supreme Court of Appeals.

Va. Const., Sec. 156, sub-section (d)—Rec. p. 87;

Act of April 15, 1903, (Rec. p. 103).

Surely, it cannot be contended that the Commission can **appeal from its own decisions!** and if the Commonwealth, as **appellant** in such proceedings in the appellate court, is not identical with the Commission, then neither is it so as plaintiff in the nisi prius court.

D.

Western Union Tel. Co. v. Myatt, 98 Fed. 335.

Appellees rely strongly on this case; but concerning it we desire only to say:

(1)—What that opinion says about the Kansas Commission being violative of provisions of the Federal Constitution, was **wholly obiter**, seeing that, as stated by the judge who delivered the opinion, the decision was based upon the fact that the

Commission was an illegal body under the Constitution of Kansas—see 98 Fed. 353—and has since been held to be so by the Kansas court.—State vs. Johnson, 60 Pac. 1069.

(2)—The views expressed by the learned judge in the Myatt case, on Federal questions, so far as they differ with those set forth in this note, it is respectfully submitted, cannot be sustained; and against the decision of that **one judge** of a **nisi prius** court, in a single case, we cite and rely with confidence upon the decisions and opinions, dealing with the same subjects, of the **five judges**, composing the **Supreme Appellate Court** of Virginia in the two cases of **Commonwealth vs. Atlantic Coast Line Ry. Co.**, 106 Va. 61, and **Winchester, &c., Co. vs. Commonwealth**, Idem, 265.

(3)—While the Kansas Commission has been held to be an illegal tribunal by the highest court of its own State—State vs. Johnson, 60 Pac. 1069—the **Virginia Commission has been again and again upheld by the highest court of that State, as a valid tribunal, both as regards the Federal** and the State Constitution.

Atlantic Coast Line Ry. Co. vs. Commonwealth, 102 Va. 599;
Norfolk, &c., Co. vs. Commonwealth, 103 Va. 289;
Winchester, &c., Co. vs. Commonwealth, 106 Va. 265;
Commonwealth vs. Atlantic Coast Line Ry. Co., 106 Va. 61.

E.

RESUME.

The Corporation Commission of Virginia is a judicial court of record, which had already assumed and exercised jurisdiction over the subject matter involved in these appeals, and, as was recently said by Mr. Justice Peckham, in Ex parte Young, 209 U. S., 162:

> **"The Federal Court cannot, of course, interfere in a case where the proceedings were already pending in the State court."**

The rates prescribed by the Virginia Corporation Commission are enforceable only by the judicial process of that court,

in the enforcement (by fines or penalties, on rules to show cause issued by itself), like any other court, of obedience to its orders and decrees. The injunctions in these proceedings are not directed against any administrative act by the Commission, but against its further action **as a court in the enforcement of its own orders**. Again quoting the language of Mr. Justice Peckham in the case just cited (p. 163):

> **"An injunction against a State court would be a violation of the whole scheme of our government."**

While the organization and procedure of the Virginia Commission is novel in some of its details and minor features, yet, in substance and essentials, it merely follows precedents of England, Virginia and other American States, established for over one hundred years, of the rate-making power being committed to the courts. And this important and beneficent tribunal, established, with so much care and thought, to meet all the requirements of the Federal Constitution as heretofore interpreted by this honorable court; in which every legitimate right or interest of the carrier is safeguarded to the utmost, and more effectually protected than any other property right in the land; and which, in the six or more years of its existence, has proven itself to be a most satisfactory and efficient governmental machine, both as regards the public and the carriers—this great institution should not be overthrown or emasculated because it may not fully accord with antiquated maxim or impracticable theory about the three functions of government, involving in this case no substantial rights, but merely an abstract and academic classification.

As this honorable court has said:

> **"Constitutions are intended to preserve practical and substantial rights, not to maintain theories."**
>
> **Davis vs. Mills**, 194 U. S. 457.

Or as Edmund Burke wrote to the Sheriffs of Bristol:

> **"Government is a practical thing, made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians."**

Respectfully submitted.

A. CAPERTON BRAXTON,
of Counsel for Appellants.

Richmond, Va., Oct. 7th. 1908.

Appendix No. 1

First—Among the powers and duties imposed upon the Virginia **county courts**—which, as held in Pennybocker vs. Switzer, 75 Va. 685, were "courts of general jurisdiction"—were the following:

To permit the erection of wharves at county landings; **fix the rates, charges and conditions** of the privilege so granted; revoke such privilege, alter such conditions, or **regulate such rates and charges.** (Va. Code 1887, Sec. 999.)

To **prescribe the rates** to be charged by ferries. (Va. Code 1819, Vol. 2, p. 261; Va. Code 1873, pp. 612, 615.)

In Wimbish vs. Breeden, 77 Va. 324, it was decided that **an order** of the county court, **establishing a ferry,** was as **conclusive** as any other unreversed **judgment of a court** of competent jurisdiction, and, for error, could be reviewed **only on appeal.**

To **fix the county levy,** and **assess** the titheable persons in the county. (Va. Code 1819, Vol. 2, p. 63.)

To cause examinations of existing county roads, or contemplated routes for new roads, and reports to be made upon the expediency of altering the location or grade of any road, or of establishing any new road, or of building or repairing any bridge. (Va. Code 1887, Sec. 945.)

To **determine** what should be the **width** or **grade** of a road. (Va. Code 1887, Sec. 946.)

Upon the return or the viewers' report, to determine the **expediency** of establishing or altering a road or landing. (Va. Code 1887, Secs. 948, 949, 950.)

To confirm or reject the award of compensation made by its assessors. (Va. Code 1887, Sec. 951.)

To **discontinue roads or landings.** (Va. Code 1887, Sec. 959.)

To permit gates to be erected across roads; to **discontinue the same,** and to decide what damages, if any, shall be al-

lowed for such discontinuance. (Va. Code 1887, Secs. 960-'1.)

To dispense with **railings on bridges or dams.** (Va. Code 1887, Sec. 962.)

To authorize **expenditures on roads.** (Va. Code 1887, Sec. 987.)

To **contract for the building or repairing of bridges and causeways.** (Va. Code 1887, Sec. 988.)

To **contract for roads to be improved and kept in order.** (Va. Code 1887, Secs. 991-'4.)

To **permit the construction of tram-roads along the** county roads. (Va. Code 1887, Sec. 1000.)

To **grant leave for dams** to be built, or **canals** to be cut. (Va. Code 1887, Secs. 1347, 1353.)

To **allow or discontinue rewards** for killing panthers, wolves, etc., and **make regulations** for establishing the right to such rewards. (Va. Code 1873, p. 838.)

To **direct provisions to be furnished to the poor.** (Va. Code 1887, Sec. 877.)

To declare any stream of water to be a **lawful fence** as to stock, and to **revoke** such order. (Va. Code 1887, Secs. 2051-'2.)

To **alter, increase or diminish the election districts** of the county, **change the voting-places** therein, and **establish** others. (Va. Code 1887, Sec. 113.)

To **change the revenue districts** in the county. (Va. Code 1887, Sec. 448.)

To **alter, increase or diminish the magisterial districts** of the county. (Va. Code 1887, Sec. 804.)

To **divide** the county **into precincts for processioning land.** (Va. Code 1887, Sec. 2405.)

To **examine the list of delinquent tax-payers,** returned by the county treasurer. (Va. Code 1887, Sec. 608.)

To **approve the title to real estate** acquired for county purposes. (Va. Code 1887, Sec. 824.)

To **approve** and ratify the **sale, exchange or purchase of county property.** (Va. Code 1887, Sec. 834.)

To **appoint commissioners to examine and report on warehouses.** (Va. Code 1873, p. 746.)

To **appoint a special police force,** and **remove** them. (Va. Code 1887, Secs. 3922-'3, 3929.)

To **appoint** such extra **justices of the peace and constables** as it shall deem the public service requires. (Va. Code 1887, Sec. 97—Ex parte Bassett, 90 Va. 679.)

To **appoint road surveyors**. (Va. Code 1887, Sec. 1005.)

To **appoint** as many **oyster inspectors** as it may deem necessary, and **assign them to such limits** as it may prescribe (Va. Code 1887, Sec. 2131.)

Second—And, since the abolition of the said county courts on February 1st, 1904, the following are some of the powers and duties imposed upon the present **Circuit Courts** in Virginia:

To **grant leave** for the **establishment of ferries, prescribing the numbers of hands and the number and kind of boats,** and to **revoke or forfeit such privilege,** and **change such order** as to said hands and boats. (Va. Code 1904, Secs. 1375-'7, 1380, 1382.)

To **prescribe the rates** to be charged by such ferries, and to **increase or reduce such rates.** (Va. Code 1904, Secs. 1377, 1379.)

To **permit the erection of wharves** at county landings; **fix the rates, charges and conditions** of the privilege so granted, revoke such privilege, alter such conditions, or **regulate such rates and charges.** (Va. Code 1904, Sec. 944-a, clause 32.)

To grant leave for **dams** to be built, or **canals** to be cut. (Va. Code 1904, Secs. 1347-1353.)

To permit the construction of **tram-roads** along the county roads. (Va. Code 1904, Sec. 944-a, clause 32.)

To decide where **cattle-guards** shall be constructed by **railroads.** (Va. Code 1904, Sec. 1294-d, clause 16.)

To decide where **wagon-ways** shall be constructed by **railroads,** and determine **what are suitable and convenient ways.** (Va. Code 1904, Sec. 1294-b, clause 2—Adams vs. Tidewater R. Co., 60 S. E. Rep. 129.)

To decide that a **turnpike** has been **properly constructed,** as a **pre-requisite** to the right of the company to **charge toll.** (Va. Code 1904, Sec. 1294-j, clause 4.)

To **contract** for **water-courses** to be **cleared of obstructions.** (Va. Code 1904, Sec. 1340.)

To **alter, increase or diminish the magisterial districts** of a county. (Va. Code 1904, Secs. 804-9.)

To **examine and consider applications for pensions,** merely **approving,** but **not adjudicating,** the same. (Va. Code 1904, Sec. 382-a, clause 9—See U. S. vs. Ferreira, 13 How. 39.)

To **approve the title to real estate** acquired for county purposes. (Va. Code 1904, Sec. 824.)

To **approve** and ratify the **sale, exchange or purchase of** county property. (Va. Code 1904, Sec. 834), as well as **loans and investments** of county funds. (Va. Code 1904, Sec. 944-a, clause 42.)

To **approve the sale or exchange** of school property, and **investment of the proceeds.** (Va. Code 1904, Sec. 1466-a.)

To **appoint** the members of the **electoral board** for a county (Va. Code 1904, Sec. 64); and also a **county surveyor,** and a **superintendent of the poor** (Va. Code 1904, Sec. 95); also a **board of pension commissioners** (Va. Code 1904, Sec. 382-a, clause 12); also **assessors of taxes** (Va. Code 1904, Sec. 437); also extra **conservators of the peace** (Va. Code 1904, Secs. 883, 3922, 3929); and also **ballast masters** (Va. Code 1904, Sec. 1991).

See also the long list of **non-judicial** duties mentioned in **Barbour vs. Grimsley,** 107 Va. 817-822, and in **Henrico County vs. Richmond,** 106 Va. 282, 295.

The latter case upheld the validity of a **statute** which required the **circuit courts** to determine the **necessity for,** and **expediency of, annexing territory to cities and towns, to enter an order annexing such territory as the courts deemed proper, and affixing thereto conditions deemed just.**

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

The Virginia Corporation Commission Cases.

Office Supreme Court, U. S.
FILED.
OCT 5 1908
JAMES H. McKENNEY,
CLERK

No. 270.

ROBERT R. PRENTIS, HENRY C. STUART, AND JOSEPH E. WILLARD, CONSTITUTING THE STATE CORPORATION COMMISSION OF VIRGINIA, AND R. T. WILSON, CLERK THEREOF. . . . . *Appellants*

versus

ATLANTIC COAST LINE RAILROAD CO.. . . . . *Appellee*

No. 271.

SAME . . . . . *Appellants*

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY . . . *Appellee*

No. 272.

SAME . . . . . *Appellants*

versus

CHESAPEAKE WESTERN RAILWAY COMPANY . . . . . *Appellee*

No. 273.

SAME . . . . . *Appellants*

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY . . *Appellee*

No. 274.

SAME . . . . . *Appellants*

versus

NORFOLK AND WESTERN RAILWAY COMPANY . . . . . *Appellee*

No. 275.

SAME . . . . . *Appellants*

versus

SOUTHERN RAILWAY COMPANY . . . . . *Appellee*

Opening Brief by WILLIAM A. ANDERSON, Attorney General of Virginia, and as such Ex-officio of Counsel for Appellants

WHITTET & SHEPPERSON,
PRINTERS AND PUBLISHERS,
RICHMOND, VA.

Supreme Court of the United States.

OCTOBER TERM, 1908.

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Appellants.

No. 270. versus.

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellee.

SAME,

Appellants.

versus

No. 271.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Appellee.

SAME,

Appellants.

versus

No. 272.

CHESAPEAKE WESTERN RAILWAY COMPANY,

Appellee.

SAME,

Appellants.

versus

No. 273.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Appellee.

SAME,

Appellants.

versus

No. 274.

NORFOLK AND WESTERN RAILWAY COMPANY,

Appellee.

SAME,

Appellants.

versus

No. 275.

SOUTHERN RAILWAY COMPANY,

Appellee.

Six cases heard together.

"The Virginia Corporation Commission cases."

Opening brief by William A. Anderson, Attorney-General of Virginia, and as such *ex officio* of counsel for the appellants.

MEMORANDUM.

The following brief is filed in each and all of the above cases heard together as one case under the orders of this court. The references to the printed record will, unless otherwise indicated, all be made to the printed record in case No. 270—the case of Robert R. Prentis et als. vs. Atlantic Coast Line R. R. Co.

STATEMENT OF THE CASE.

(1.)

The Virginia State Corporation Commission is a tribunal created under the provisions of Sections 155 and 156 of the Constitution of Virginia, and clother with the powers, and charged with the duties defined in said sections, and also invester with the powers and duties prescribed by the Acts of the General Assembly of Virginia enacted in obedience to, or in conformity with, said sections of the Constitution, which acts were approved April 15, 1903, May 16, 1903, and also charged with the duties and clothed with the powers set forth in Section 19 of Chapter II of "An Act Concerning Corporations," approved January 18, 1904, similarly enacted, which sections of the Constitution, and statutes of Virginia are printed in the Appendix to this brief.

(2.)

On the 3rd day of October, 1903, said tribunal, as required by law, adopted the Rules of Practice and Procedure, found at page 155 of the record, and printed in the Appendix of this brief.

(3.)

Pursuant to notice given by its order of July 31, 1906, to the appellees and the other steam railroad companies operating railways in Virginia (R. 120), and after repeated and exhaustive hearings between December 4, 1906, and April 27, 1907, at which hearings the appellees had the fullest opportunity to present their objections to the proposed, or to any other reduction in their charges and fares for the transportation of passengers, to introduce testimony, and to be fully heard by

counsel in opposition to any such reduction in their passenger fares, and did actually introduce all the evidence, and by their counsel submit all of the arguments, which they were advised that they should present in opposition to the proposed, or any other reduction of their passenger fares, the Virginia State Corporation Commission rendered the decision, and entered up the order and judgment, a transcript of the record of which decision, order, and judgment will be found at pp. 120 to 166 of the printed record of case No. 270.

(4.)

Besides the evidence introduced on behalf of the appellees and other companies in like position with them, at the hearings and sessions of said Commission held between December 4, 1906, and April 27, 1907, the Commission had given repeated hearings in what is known as the "Freight Rate Cases" extending at intervals through several months, at which sessions a great mass of testimony was introduced by the appellees, covering several thousand pages, all of which was made a part of the evidence, in the case now under review designated as the "Passenger Rate Proceeding," so that besides the great number of days which said Commission devoted specially to the hearing and consideration of said Passenger Rate Cases, it also, sitting as a court, devoted a great number of days and a great deal of time to the hearing of evidence and arguments of counsel on behalf of the appellees here in said Freight Rate Case, a considerable portion of which were pertinent to and were relied upon in the Passenger Rate Case, now under review in these six cases. See affidavit of R. T. Wilson, Clerk, R. p. 119.

(5.)

None of the appellees availed themselves of the absolute right of appeal to the Supreme Court of Appeals of Virginia

given by sub-section (d) of Section 156 of the Virginia Constitution, and still more fully and freely accorded to them by Section 34 of the Act approved April 15, 1903, printed in the Appendix to this brief, and at page 103 of the Record; but instead of availing themselves of the ample remedy provided by those enactments, they proceeded to attack said decision, judgment, and order of said Commission by the six chancery suits instituted by said six companies respectively in the Circuit Court of the United States for the Eastern District of Virginia, and by applying to the Honorable Judge of said court for temporary, and afterwards for a *pendente lite* injunction, and then for a perpetual injunction against said decision, order, and judgment of said State tribunal, which injunction orders were subsequently granted by said court. (R. 62, R. 173, 175, and R. 194-196). The grounds on which said applications were made are set forth in the bills filed respectively in each of said six cases, and will, within the purview of this appeal, be found to be substantially the same in each case.

(6.)

By its express terms and by operation of sub-section (b) of Section 156 of the Constitution of Virginia (R. 85), the said order and judgment of the Commission did not and could not become effective at once.

By the said mandate of the Constitution it was required that it should "first be published in substance, not less than once a week for four consecutive weeks in one or more newspapers of general circulation published in the city of Richmond, Virginia."

And said order and judgment required that the Clerk of the Commission should "publish the order in full in one of the newspapers of general circulation published in the city

of Richmond, once a week for four consecutive weeks, as required by law."

Pending such publication, and while said order was inchoate, incomplete, and ineffective, it was held up, first, by a temporary restraining order entered by the Honorable J. C. Pritchard, judge of said circuit court, at the suit of the appellees, (R. pp. 62-64), then by said interlocutory or *pendente lite* injunction, and subsequently perpetually enjoined by the final decree entered by said Circuit Court of the United States for the Eastern District of Virginia on the 26th day of December, 1907, (R. pp. 194-196). The jurisdiction of said court for the entering of said restraining orders was thus invoked and exercised when said order of the Commission was *in fieri* and before it had, either by its terms, or by operation of law, become effective.

To the citation to show cause why such injunction and restraining order as was prayed for by the appellees in their respective bills should not be granted, the appellants filed their joint and separate answer in each case, which was, *mutatis mutandis,* the same in each case, which answer with the five exhibits filed therewith, will be found in the record of case No. 270 at pp. 67 to 166. This answer which was filed pursuant to the special and limited appearance which appellants by their counsel had entered in each of said suits at the first rules after these six suits were brought (R. 167), set forth the facts and the grounds upon which the appellants denied the jurisdiction of the said circuit court in the premises, and which are relied upon by them in this court.

SPECIFICATION OF ERRORS.

We respectfully submit that the Circuit Court of the United States for the Eastern District of Virginia, and the Honorable

Judge thereof, were without jurisdiction to entertain said suits, and that each of said bills should have been dismissed, upon the following and upon other grounds which are suggested by or embraced in those here specifically stated. And we respectfully assign the following errors in said decree of December 26, 1907:

First. The said court erred in taking jurisdiction of the defendants in said causes, and of said causes:

Second. The said court erred in not sustaining the validity of the several organic and statutory enactments of Virginia by which said tribunal was created, and its powers, duties, and modes of procedure were prescribed, and which the complainants in said causes charged "to be in contravention of the Constitution of the United States."

Third. The court erred in deciding that the law of the Commonwealth of Virginia expressed and embodied in the said order of the said Commission entered on the 27th of April, 1907, was, as it was claimed to be by the complainants in said causes, "in contravention of the Constitution of the United States."

Fourth. That the court erred in overruling the demurrers to each of said bills (R. 180) for the reasons shown on the face of these demurrers.

Fifth. That the court erred in overruling the joint and separate plea filed by three of the appellants on the 5th of August, 1907 (R. 181-184).

Sixth. That said court erred in overruling the plea of *res adjudicata* filed by the defendants (R. 191-193).

Seventh. That said court erred in awarding any injunction to stay the proceedings of said Virginia State Corporation Commission in the premises, for the reason that said tribunal was and is, in fact, and in law, a court, and that the decree of said Circuit Court for the Eastern District of Virginia staying the proceedings of said Commission, were in direct contravention of Section 720 of the Revised Statutes of the United States.

Eighth. Under her colonial government, as well as from the establishment of her independence from the British Crown, Virginia has possessed and exercised, through such governmental agencies as her people chose to establish, the power and the right of governmental regulation of persons and corporations engaged in any business affected with a public interest, such as the conduct of ferries, wharfs, mills, hotels, and the transportation by common carriers of passengers and goods, for hire.

This right and power were among the essential attributes of sovereignty and government to which she succeeded and which belonged to her as a State, just as the muniments of Anglo-Saxon liberty have been and are the heritage of her people.

She has never parted with them, except to the extent that she with her sister States, has delegated to the Federal Government the power of regulating commerce with foreign nations among the several States, and with the Indian tribes.

The power and right within her own borders, of regulating all common carriers and all public service companies, in respect to the services which they shall render to the public, and the charges which they may make therefor, is a part of that great mass of reserved powers which constitute the police power of the State, which is as much within the rightful jurisdiction

of the State to-day, as it was before the adoption of the Federal Constitution.

A palpable error in the decree complained of is, that the court in rendering it ignored, or disregarded these primary and fundamental rights of the Commonwealth; for the effect of the decree is to deny to the Commonwealth the right to effectively regulate railroad companies in respect to the charges they may make for the services they render the public within the limits of the State; for if Virginia cannot regulate such corporations in this regard, in the just and fair manner in which that power was exercised in these cases, she cannot effectively regulate them at all.

ARGUMENT.

We will now proceed to review the grounds upon which the complainants in the lower court assailed the judgment and order of a State tribunal, and upon which they will doubtless in this court seek to justify the injunction orders of the circuit court staying all further proceedings by said Commission in the case to which said injunction order refers.

It is important for the court, at the outset, to fully comprehend the precise character of the tribunal which Virginia has created for the purpose of the just and effective regulation of public service corporations, and to realize what a careful examination of the record will demonstrate to be the truth:

(1) That this tribunal is created by the *Constitution* of the Commonwealth and made a department of the State government. (Secs. 155 and 156 Va. Constitution.)

(2) That, as to its duties, powers, and jurisdiction, the manner, procedure, and processes, by which those duties shall be discharged, and the powers and jurisdiction with which it

is clothed in determining the rates which such companies shall charge for the service they render to the public, it is expressly made a court,—a court of special and limited jurisdiction,—but to all intents and purposes a court.

(3) That due process of law, and the equal protection of the laws, and the right to avail of all proper judicial process, are guaranteed to every litigant before said tribunal, and to every company, or person whose rights or interests are affected by any act or order of said Commission, both by the Constitution and laws of Virginia, and by the rules of procedure and by the actual practice of the Commission in the conduct and trial of cases before it.

(4) That the legislative and executive duties, and powers with which this tribunal is invested are either ancillary, or supplemental to its judicial powers, or are not in their exercise inconsistent with just and fair dealing with such corporations, but are necessary to their proper and effective regulation.

(5) That the Commission is not clothed with arbitrary or irreviewable power, for its acts are subject to review by the Supreme Court of Appeals of the State, an appeal of right to that court being allowed from any order of the Commission, to any person aggrieved, with the right to a writ of supersedeas to such order upon just and equitable terms.

And, if in turn the Supreme Court of the State shall upon such appeal deny the appellant any right assured to him by the Federal Constitution, the doors of this court are open to him to obtain relief by invoking its paramount jurisdiction.

(6) That the jurisdiction of this tribunal is limited to subjects, the regulation of which lies within the rightful domain of the police power of the States.

(7) That in its origin, and in some of its most important characteristics, particularly in its being a distinct department of the State government established by the organic law of the Commonwealth; in its being distinctly a court; in the assurance of a full and fair trial, of due process of law, and of the equal protection of the laws which it accords and must accord to every litigant within its jurisdiction; and in the processes and rules of procedure and practice which give effect to these guarantees, it radically differs from any State Railway Commission, or State Corporation Commission, whose acts have been as yet reviewed by this court.

(8) That it was evidently the purpose of the makers of the Virginia Constitution, and of her General Assembly, in enacting the laws creating the State Corporation Commission to establish a tribunal which would deal, in the first place, fairly and justly, and in the second place, effectively with this complex and difficult subject, and which, while securing the public against abuses and excessive charges, would give the transportation companies the amplest protection against wrong or injustice, or any arbitrary exercise of power; and that this purpose has been here more nearly attained than by any measures as yet adopted elsewhere.

(9) It will be farther apparent that no case has ever been decided or considered by this court which presents the question whether the inferior courts of the United States have jurisdiction by injunction to stay the proceedings of a State court of rightful and lawful, though of special and limited, jurisdiction, or to entertain a suit instituted for the purpose of attacking an order and judgment of such a tribunal, in manner, form, and substance as that question of supreme importance is presented in these six cases.

We will consider, first, the principal ground upon which the appellees have rested their attack upon the order and judgment of the Commission complained of, namely that:

THE VIRGINIA STATE CORPORATION COMMISSION IS AN UNCONSTITUTIONAL AND INVALID TRIBUNAL.

This contention is based upon the proposition that Sections 155 and 156 of the Virginia Constitution, and the statutes enacted in effectuation thereof, by virtue of which Sections and statutes said Commission exists, and from which it derives its powers, are unconstitutional and void, and the Commission thus constituted an illegitimate and invalid tribunal, because said sections and statutes concentrate in this one body legislative, judicial and executive functions and duties, and empower and require it to exercise the powers of all three of these departments of government in respect to public service companies, and as to those companies only; that such being the purpose and effect of said enactments, they violate the principle enunciated in Section 5 of the Virginia Bill of Rights: "That the legislative, executive and judicial departments of the State should be separate and distinct;" and, also, contravene the inhibitions of the XIVth Amendment to the Constitution of the United States, for the reason that, both said organic and legislative enactments operate to deprive the complainants and other transportation companies of their property without due process of law, and to deny to these particular classes of corporations and companies the equal protection of the laws.

The importance of the question thus presented cannot be easily exaggerated, for it strikes at the very existence of a great department of the State government. Indeed it strikes at the right of the State to justly and effectively regulate such companies in respect to their duties to the public; for, if the State

cannot regulate them in this way, it cannot justly and effectively regulate them at all.

To maintain their contention, the burden is upon the complainants to show that any law, whether organic or statutory, which devolves upon any tribunal, board or officer of a State the functions, duties, and powers of the legislative, executive, and judicial departments of government, or of any two of those great departments, is a void enactment, because the necessary effect and operation of such a law is to deny to the persons whose rights and interests may be affected by the action of such a tribunal or officials the equal protection of the laws, or to deprive them of their property without due process of law. Or, in the trenchant language of one of the counsel for the plaintiffs, that:

> "The union of legislative, executive, and judicial duties and powers of government in any one body or official, contains all of the elements of despotism. It is despotism."

It must be conceded that there can be nothing in the suggestion that Sections 155 and 156 of the Constitution, and the statutes enacted in pursuance thereof are inconsistent with Section 5 of the Virginia Bill of Rights, for the latter is merely an abstract expression of opinion as to a policy to be pursued, as a rule, while the latter are positive, substantive, and operative enactments, both being parts of the same instrument and having the same sanction.

But if there could be any possible question about this, and if it was a question which could be regarded as in any sense a Federal question, or be considered in this case, it is effectually disposed of by the language of Article III of the same Constitution, which is as follows:

ARTICLE III.

> "SECTION 39. Except as hereinafter provided, the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."

This article expressly saves all the sections of the Constitution which blend the powers of two or more of these great departments in the same official, or the same body or board, from the operation of the rule stated in the Bill of Rights. It will be found that there are a number of sections in this Constitution, as well as in the former Virginia Constitutions, and in the Constitutions of all of the other States of the American Union which do the same thing.

As already indicated, the proposition which the advocates of this doctrine must maintain, involves the postulate that the concentration in one and the same official hand of the duties and powers of any two of these governmental departments is a violation of the principle for which they contend; for, if the union of legislative, executive, and judicial functions in one person or tribunal is a denial of the equal protection of the laws, and a deprivation of property without due process of law, and despotism, then the clothing of one and the same official, or body, with legislative and judicial, or with executive and judicial, or with legislative and executive powers and duties must also, though perhaps not in the same degree, operate to deprive the persons whose rights are affected thereby of those muniments of liberty guaranteed to them by the State and Federal Constitution.

If the learned counsel who make this charge against the Constitution of the Commonwealth are correct in their conten-

tion, then the sooner such an engine of tyranny and oppression as they would have us believe the State Corporation Commission must be, is ascertained to be an unconstitutional body, and wiped out of being, the better it will be for public justice, and for the liberties of the people.

The lessons of human experience, as well as the deductions of human reason, teach that whenever a ruler, or body of rulers, are given, or usurp, power over the persons or property of their fellow men without check or limitation, the result will be despotism, more or less oppressive or humane according to the character of the rulers, who, at any given time, are clothed with such arbitrary power.

This was true of the government of Venice under the Doges, as much as it was true of that of France under Louis XIV, or under the National Assembly or the Convention and the Committee of Safety, or of Russia under its Czars.

It may be true as well of governments which are *in form* democracies, or republics, as of governments which are monarchial or imperial in form.

While it is necessarily true that a government in which unrestrained and unreviewable legislative, executive, and judicial powers are vested in any one official, or body of officials, is a despotic government, it is not the concentration of these powers in, or the exercise of these different functions by the same official, which necessarily renders such government, or department of government, despotic. It is the fact that these great governmental powers are or may be exercised *without any check or limitation,* and are therefore an *arbitrary exercise of power.*

It is undoubtedly, as a general rule, wisest and best, as is declared in the Virginia Bill of Rights: "That the legislative, executive and judicial departments of the government should be kept distinct;" but it is not essential to liberty that this shall

be done in all cases, or in any case, provided these governmental powers are not so united in one officer or tribunal, that they may be arbitrarily exercised to the prejudice of the rights or liberties of the people, without assuring to any person aggrieved any adequate remedy for the prevention or redress of wrong or injustice.

In other words, any grant of arbitrary and unlimited and irresponsible power operates as a denial of the equal protection of the laws, a deprivation of property without due process of law, and an encroachment upon the liberties of the people, and is therefore a violation of the State and Federal Constitutions; but it is only such grants of power as are thus arbitrary and unrestrained in their exercise that are inimical to liberty and prohibited by fundamental law.

We have no quarrel with the contention, that the concentration of the legislative, executive and judicial power of the State in the hands of a single ruler, or an oligarchy of rulers, is despotism; for this is the same thing as saying that the clothing of one man, or body of men, with *all the powers of government*, is despotism; and this is manifestly the sense in which the great publicists who have formulated this principle, from Montesquieu to James Madison and John Taylor, of Caroline, have used the terse language in which they have expressed their conception of the doctrine.

To carry the principle to the extent contended for by complainants counsel would be to hinder and cripple the just and efficient administration of any State government.

So far as my reading extends, I learn of no free government which has ever existed, or which now exists, in which the powers of two, or of all three of the great distinctive departments of government have not been for some important purposes united, sometimes in one body, and sometimes in some one

official. Without referring to the ancient republics of Greece, and Rome, as to which this was true, particularly as to the powers exercised by the Roman Senate, we find ample confirmation of the statement in the free governments of modern times.

Montesquieu is the favorite authority relied upon by the advocates of the extreme view which we are considering, and they quote with delightful satisfaction the memorable words of the illustrious sage, where he says:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.
>
> There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.
>
> Most kingdoms in Europe enjoy a moderate government, because the prince, who is invested with the two first powers, leaves the third to his subjects. In Turkey, where these three powers are united in the sultan's person, the subjects groan under the weight of a most frightful oppression.
>
> In the republics of Italy, where these three powers are united, there is less liberty than in our monarchies. Hence their government is obliged to have recourse to as violent methods for its support, as even that of the Turks: witness the state inquisitors, and the lion's mouth into which every informer may at all hours throw his written accusations.
>
> What a situation must the poor subject be in, under

> those republics? The same body of magistrates are possessed, as executors of the laws, of the whole power they have given themselves in quality of legislators. They may plunder the state by their general determinations; and as they have likewise the judiciary power in their hands, every private citizen may be ruined by their particular decisions.
>
> The whole power is here united in one body; and though there is no external pomp that indicates a despotic sway, yet the people feel the effects of it every moment."

Montesquieu's Spirit of Laws, Vol. 1, Book XI, Chap. 6, pp. 181-182.

The chapter from which this language is quoted is the very one in which Montesquieu takes the Constitution of England as a model, and commends it as one which establishes liberty; and yet under that very constitution, supreme legislative powers were vested in parliament, which was because of its juridical functions defined as "The High Court of Parliament" (4 Coke's Institutes, pp. 20, 21, 22, and 23), and the House of Lords, of which, in particular, was charged not only with legislative, but with the most important judicial functions; for it was, in 1748, when Montesquieu's remarkable work on government was given to the world, as it is to-day, the court of last resort in the British Empire, as well as a tribunal of very important original jurisdiction in the trial of peers, and in prosecutions instituted by the House of Commons.

Before that time, and long afterwards, also, very important legislative, judicial and executive powers were vested in the County Courts of England, particularly in the quarterly or general sessions of those courts, some idea as to the extent of which may be obtained from the Local Government Act 51 and 52 Victoria, Chapter 41, Part 1, Sections 3 to 30, IV Chitty's Blackstone M. p. 271; 2d Hannis Taylor's Original Growth of English Constitution, 191, 194.

The county courts of England and Wales were, till the establishment of the county councils, in 1888, not only the courts of their respective counties, having a limited but exceedingly important civil and criminal jurisdiction, but they constituted for many important purposes the local legislatures, and they were also clothed with various executive duties and powers. Their judicial functions embraced a large domain of civil and criminal litigation; their legislative, the assessing and levying of local taxes or rates, the regulation of highways, and of a great number of other subjects of local interest. Their executive functions embraced the administration of the poor laws, the construction and repair of bridges and highways, the control of the county police, and other important matters of local concern. It would be difficult to conceive of a tribunal, unless it be the old Virginia County Court, in which great legislative, judicial and executive powers were more completely, and more intimately blended than these were in the General and Quarter Sessions of the County Courts of England at the time Montesquieu wrote, and since that time; but I know of no writer who has ever charged that they were the instruments of wrong or oppression.

It is true that with the growth of wealth, and population, and the increased complexity of the local affairs and interests to be regulated and administered, all of the legislative and most of the administrative functions of the English County Courts have now, since 1888, been conferred upon the County Councils, but these County Councils are themselves obnoxious to the criticism of those who would impeach the validity of the Virginia Corporation Commission; for difficult and very important legislative and executive powers are devolved by the English Local Government Act upon these councils in the exercise of some of which these composite bodies are clothed also with

a discretion which may in some instances be considered as judicial. 51 and 52 Victoria, Chapter 43.

As indicating how flagrantly the Constitution and Parliament of England have violated the fundamental conditions of liberty in the constitution of these county councils, if complainant's counsel are correct in their contention, I will enumerate some of the powers conferred upon the County Councils by the Act of Parliament of 51-52 Victoria, most of which had theretofore been devolved by statute or the Common Law upon the "Quarter Sessions."

1. The assessing and levying of all county, police, and hundred rates, and the appropriation thereof.

2. The borrowing of money.

3. Settlements with the county treasurer.

4. The erection and control of county buildings, and control of county property.

5. Granting licenses for a number of businesses requiring a license.

6. The fixing of the salaries of many county officers.

7. The fixing and defining polling districts, and regulation of matters connected with registration of voters.

8. The maintenance of public highways and bridges.

9. The enactment of county by-laws upon a number of subjects.

10. The support of the poor.

11. The eradication and prevention of disease; and a number of other important legislative and administrative functions and duties. Many of these legislative and executive powers were prior to the local government act vested in the county courts in general session, as also were the varied, important and distinctly judicial powers which were devolved upon those tribunals.

Nor must it be forgotten that under this same Constitution of England, which Montesquieu considered so admirable, the *absolute* and *unreviewable* control of common carriers and of all public service companies and of all businesses affected with a public interest, in respect to the duties and services to be rendered to the public, and the rates and charges to be made therefor, had been for centuries vested in Parliament, in the county courts, or in agencies or tribunals authorized by Parliament or sanctioned by immemorial usage and precedent.

Neither Montesquieu, nor any publicist or jurist since his day, has ever shown that Parliament, or the House of Lords, or the county courts of England were the agencies of despotism, because they were clothed with and exercised at times legislative and judicial, or legislative, executive and judicial powers.

Again, in this very model constitution of England, we find another blending of these great governmental powers, for the King of Great Britain is also an integral part of the legislature of the realm, for in theory, at least under the constitution of England, no act of Parliament can become a law without his consent.

But a more significant and pointed illustration of the very sort of tribunal which has been established under the Virginia Constitution and laws made in pursuance thereof, and which has been made the subject of such harsh criticism by counsel for the appellees is furnished by the English Railway and Canal Commission.

The powers conferred upon this Commission by the Acts of Parliament in respect to the regulation and control of railway companies, are in many respects similar to, and as comprehensive as, those conferred upon the Virginia Commission as to such companies.

As is the case, as we have seen, in regard to the Virginia

Commission, the English Commission sits and proceeds as a court, and is recognized by the English statutes as a court, when it hears and decides the cases which come within its extensive jurisdiction in the matter of the regulation of railway and canal companies. See 36 and 37 Victoria, Chapter 48, pp. 238-250; and 51 and 52 Victoria, Chapter 25, pp. 177-192.

Appeals from the orders of the Commission lie to the Courts of Appeal, *but upon questions of law only;* and only where there may be a difference of opinion between any two superior Courts of Appeal, may be allowed by a superior Court of Appeal affected by such difference of opinion, to the House of Lords.

No order or proceeding of the Commission can be attacked collaterally, or questioned or reviewed, except upon such appeal.

Some idea as to the character of this English Commission, and of its procedure, and of the effect of its orders, can be gotten from the following extracts from the Act of Parliament relative to those matters:

> "17.—(1) No appeal shall lie from the Commissioners upon a question of fact, or upon any question regarding the locus standi of a complainant.
>
> (2) Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal.
>
> (3) An appeal shall not be brought, except in conformity with such rules of court as may from time to time be made in relation to such appeals by the authority having power to make rules of court for the superior court of appeal.
>
> (4) On the hearing of an appeal, the court of appeal may draw all such inferences as are not inconsistent with the facts expressly found, and are necessary for determining the question of law, and shall have all such powers for that purpose as if the appeal were an appeal from a judgment of a superior court, and may make any order which the Commissioners could have made, and

also any such further or other order as may be just, and the costs of and incidental to an appeal shall be in the discretion of the court of appeal, but no Commissioner shall be liable to any costs by reason or in respect of any appeal.

(5) The decision of the superior court of appeal shall be final: Provided that where there has been a difference of opinion between any two of such superior courts of appeal, any superior court of appeal in which a matter affected by such difference of opinion is pending may give leave to appeal to the House of Lords, on such terms as to costs as such court shall determine.

(6) Save as provided by this Act, an order or proceeding of the Commissioners shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari, or otherwise, either at the instance of the Crown or otherwise."

"18.—(1) For the purpose of this Act the Commissioners shall have full jurisdiction to hear and determine all matters whether of law or of fact, and shall as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of their orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of their jurisdiction under this Act, or otherwise for carrying this Act into effect, have all such powers, rights, and privileges as are vested in a superior court: Provided that no person shall be punished for contempt of court, except with the consent of an *ex officio* Commissioner.

(2) The Commissioners may review and rescind or vary any order made by them; but, save as is by this Act provided, every decision or order of the Commissioners shall be final."—51 and 52 Victoria, Ch. 25, Sections 17 and 18.

The English Railway Canal Commission was first established by the Act of Parliament of July 21, 1873. It was at first an experimental measure, and its operation limited to five years and thereafter until the end of the then next session of Parliament.

It was, by successive enactments, continued in force until August 10, 1888, when, by Section 47 of Chapter 25 of 51 and 52 Victoria, it was enacted that:

> "47. So much of the Regulation of Railways Act, 1873, as limits the time during which that Act shall continue in force shall, save so far as it relates to the appointment of the Commission, be repealed, and the said Act, save as aforesaid, shall be perpetual."

So we here have the reiterated sanction of the wisdom and experience through a period of thirty-three years, of one of the most enlightened nations on earth, and the nation of all others, except possibly our own, most zealous in its devotion to the principles of liberty, and in its protection of the rights of property, thus given to a tribunal clothed in its main features with as great powers, and in some particulars with greater powers than those which are conferred upon the Virginia Commission; and clothed, too, with legislative, judicial, and executive powers, in respect to the regulation and control of railroad companies as to the facilities they shall afford to the public.

Indeed, the English Commission in respect to its powers and duties in the matter of such regulation of railway and canal companies, is a close counterpart of the Virginia Corporation Commission.

If Montesquieu is to be taken with the literalness with which his language is sometimes applied, and if the rule laid down by him is carried to extremity, then the Constitution and laws of England furnishes an apt illustration of the aphorism that "There are exceptions to every rule."

Indeed, a government in which legislative, executive and judicial powers were never devolved upon or exercised by the same official or body, however ideal it might be, would be like the government which John Locke sought to give the people

of North Carolina, incapable of being worked in any organized society.

Other instructive examples of the union of legislative, executive and judicial powers in one official or body, are furnished by our Federal and State governments.

The President of the United States is made by reason of the power of *veto*, a part of the Legislature, and the same is true as to the governors of Virginia and other States who are invested with the veto power.

Where the Constitution confers the veto power upon the Chief Executive, it thereby makes him a part of the legislature.

Cooley's Principles of Constitution Law, pp. 50, 159, 163.

Moreover, in exercising the powers devolved upon the President of the United States, in conjunction with the Senate, in the matter of making treaties, the President is, in matters of the utmost moment to the country, a part of the law-making power.

Again, the Senate of the United States and the Senates of Virginia and of other States are undoubtedly integral parts of the legislative departments of the Federal and State governments, respectively, and yet, each of these Senates has important judicial powers conferred upon it when it sits as a court in the trial of cases of impeachment. And each is also a part of the executive department of their respective governments in the matter of the confirmation or rejection of executive appointments to office.

The Virginia General Assembly is clothed with executive power in the matter of the election of judicial and executive officers and also in the removal of judges under Section 104 of the Constitution; but as this latter power cannot be exercised, except "for cause," and after notice to the judge, accompanied with a copy of the causes alleged for his removal, and as in prac-

tice there is what amounts to a trial of the judge, the General Assembly in such cases exercises judicial functions also.

Another familiar example of the blending of two or more governmental functions is found in statutes like the tariff laws of Congress, the internal revenue law, the patent law, and similar laws which confer upon the President the power of reducing duties upon certain classes of imports upon the happening of certain conditions as to the occurrence of which he is made the judge, laws which confer upon the President or the Secretaries of the Treasury, or of the Interior, or of War, or of the Navy, or other members of the President's cabinet, or subordinate executive officers, or departments of the National Government very important powers, coupled with the exercise of a discretion involving the decision of questions of fact, or law, or of both fact and law.

But the most striking instance of the union of all kinds of powers of government in one body is that presented by the old county court of Virginia.

In this tribunal, which was partly an evolution from the county courts of England, and partly a creation of the fathers of the Virginia Commonwealth—men who, perhaps, understood the science of government and the principles of civil liberty as well as Montesquieu or his modern disciples—not only *every power* of government, but *every kind of power* of government, except the power of declaring or making war was blended and vested.

It had a wide jurisdiction for the trial of civil cases, both law and chancery, and for the trial of criminal cases.

It was the legislature of the county, fixing and levying the county taxes, regulating and controlling the care of its poor, the establishment and maintenance of highways and bridges, the charges to be made by innkeepers, ferrymen, and others

conducting businesses of a public character, and all of the important subjects of local county legislation.

It exercised also important executive and administrative functions in the matter of the appointment of county officers, making settlement with county treasurers, and in many other purely executive or administrative matters.

See Act, November, 1647, 1 Hen. St., 348; Act, 1654-5, 1 Hen. St., 4; Act, 1620, 2 Id., 11; Act, March, 1660, 2 Id., 90; Act, September, 1672, 2 Id., Act, June, 1676; Id., 359; Act, August, 1702, 3 Id., 220; Act, October, 1792, 13 Id., 449-467; 5 Id., 175; Act, October, 1748, 5 Id., 489-508; Act, 1780, 10 Id., 361; Act, 1781, Id., 468; Act, 1782, 11 Id., 22; Act, 1785, 12 Id., 32-36; Act, 1788, 12 Id., 467-474; Act, October, 1792, 13 Id., 449-467; Act, June, 1676, 2 Id., 357; Act of May, 1734, 4 Id., 369-370.

If there is anything in the contention of complainants' counsel, then the old Virginia county court was, from its very nature and constitution, essentially an undemocratic, unrepublican, and despotic institution, and should not have been allowed to exist for a day.

It is true that Washington, Madison, Jefferson, Mason, Henry, Marshall, and the other statesmen and patriots who established the Virginia Commonwealth, who knew a little about the history and philosophy of human government, and the principles of civil liberty, none of them ever discovered that their county court, which in their time was the people's court, and a very useful and highly esteemed tribunal, was obnoxious to any such criticism. They regarded it as a conservator of liberty and justice, little dreaming that it must necessarily be an engine of oppression and tyranny.

To give some idea of the high esteem in which the old Virginia county courts were held by men whose talents, characters,

and services have made the Commonwealth illustrious, I beg leave here to quote a few of the many eucamiums pronounced upon this memorable institution in the debates of the Virginia Convention of 1829-30.

Judge Philip P. Barbour (who after the resignation of Ex-President Monroe was the President of that memorable body, and who was subsequently one of the justices of this court) said of them:

> "I have practised in these courts for a quarter of a century, and I can say with the utmost truth, that my confidence in them has grown with my growth, and strengthened with my strength. After a twenty-five years' acquaintance with the County Courts of Virginia, it is my conscientious opinion that there is not, and never has been a tribunal under the sun where more substantial practical justice is administered. I am for giving them a constitutional foothold in the Commonwealth, above the control of the legislature: for myself, I would sooner part with any other department of the Government: I look to our County Courts as *tabula in naufragio.*"—Virginia Convention 1829-30, p. 507.

Tributes so high have been rarely paid to any tribunal or institution as were paid to these old Virginia county courts by Chapman Johnson, Id. 512, Benjamin Watkins Leigh, another of the great men of that era, Id. pp. 513-516, and by John Randolph of Roanoke, Id. pp. 532-3.

Governor and Ex-United States Senator Wm. B. Giles considered the existing county court system "the most valuable part of the Constitution, and that to which the peaceful and happy progress of affairs for fifty-four years was mainly to be attributed."

Chief Justice Marshall was a most influential and valuable member of that Convention.

Among other words of strong commendation of these county

courts, which fell from the lips of the great Chief Justice, were the following reported in the proceedings of the Convention for November 30, 1829, Id. p. 505:

> "I am not in the habit of bestowing extravagant eulogies upon my countrymen. I would rather hear them pronounced by others; but it is a truth, that no State in the Union has hitherto enjoyed more complete internal quiet than Virginia. There is no part of America where less disquiet and less of ill-feeling between man and man is to be found than in this Commonwealth, and I believe most firmly that this state of things is mainly to be ascribed to the practical operation of our County Courts. The magistrates who compose those courts consist in general of the best men in their respective counties. They act in the spirit of peacemakers, and allay, rather than excite, the small disputes and differences which will sometimes arise among neighbors. It is certainly much owing to this, that so much harmony prevails amongst us."

The trouble about the argument of those who contend that any union of legislative, executive, and judicial power in the hands of a single officer or body, is despotism, and therefore a denial of the equal protection of the laws, is that they have carried the doctrine upon which they rely too far. They have carried it farther than the language of Montesquieu fairly interpreted would carry it.

What that great writer had in his mind was a despotism like those with which he was familiar; the arbitrary rule of Frederick the Great, of Prussia; of Louis XIV, of France; and of Philip II, of Spain, where the whole powers of government —legislative, executive and judicial—were wielded by each of these monarchs.

It was absolutism which he was discussing, not the vesting in a co-ordinate or subordinate officer or tribunal, some of the executive, some of the legislative, and some of the judicial

powers of government, subject to judicial review, and subject to those limitations, checks and balances, which, though suggested long before their day, are, as they are embodied in the Constitution of the United States, the creations of the genius and statesmanship of the makers of that instrument.

It was the exercise of arbitrary and unchecked power to which the language of Montesquieu above quoted had reference.

He knew something of the necessity of providing that "power" shall "be a check to power," in forming a free government, though the successful application of that principle was left to the founders of the American Republic. He had the wisdom to see that:

> "Democratic and aristocratic States are not necessarily free. Political liberty is to be met with only in moderate governments. Yet even in these it is not always met with. It is there only when there is no abuse of power; but constant experience shows us that every man invested with power is apt to abuse it; he pushes on till he comes to something that limits him. Is it not strange, though true to say, that virtue itself has need of limits.
>
> "To prevent the abuse of power, it is necessary that by the very disposition of things, power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits."—Montesquieu's Spirit of Laws, Book XI, Chapter IV, p. 179.

When we come to consider our American Constitutions with their well-adjusted system of checks and balances, with the Supreme Courts, State and National, the great "balance wheels" of the system, State and Federal, we find that a check of "power against power" is provided, so that the possibility of the unrestrained, irresponsible and unreviewable exercise of arbitrary power is practically guarded against and eliminated.

Upon a careful examination of Article XII of the Virginia Constitution, which creates the State Corporation Commission, we will find this to be true of that tribunal.

That Article (and particularly Sections 155 and 156 thereof) unquestionably confers legislative, executive, and judicial powers and duties upon the Commission within the prescribed limits of its jurisdiction.

They make it in a distinct, though limited, sense a legislative department of the State Government, and its acts within the domain of its authority, have all the force of laws, and are in fact, and in legal effect, laws.

In prescribing the rates, classification of traffic, and train schedules to be made and adopted, and the facilities and conveniences to be provided, by public service companies, the Commission exercises legislative functions, though in ascertaining and determining what rates it is just and reasonable so to prescribe, it acts judicially and as a court.

> "The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function."

Interstate Commerce Commission vs. *Cincinnati, New Orleans and Texas Pacific Rwy. Co.*, 167 U. S., 479, 505.

Munn vs. *Illinois*, 94 U. S., 113, 133.

C. B. & Q. R. R. Co. vs. *Iowa*, 94 U. S., 155, 161, and the other Granger Cases.

Budd vs. *New York*, 143 U. S., 538.

Reagan vs. *Farmers' Loan & Trust Co.*, 154 U. S., 397.

Its Judicial Functions.

In determining whether the rates and charges to be prescribed, and regulations to be adopted are reasonable and just,

the Commission acts judicially, and discharges distinctly judicial functions; and so also in determining whether a transportation or transmission company has violated any requirement of any statute, or failed to comply with any order of the Commission, and in adjudging penalties against such recusant company.

Interstate Commerce Commission vs. *C. N. O. & T. P. Rwy. Co.*, 167 U. S., 479, 505.

In the conduct of hearings given to companies which have been cited before it to show cause against any proposed action of the Commission, and when it hears, considers, and decides upon the evidence adduced before it upon any such trials, as to the justness and reasonableness of any proposed rate or charge which it may have under consideration, and in making up its judgment upon the testimony and the arguments of counsel in all such cases, it sedulously observes the procedure of a court of justice, it carefully accords to the parties litigant before it not only all due process of law, but also all appropriate judicial process; and it sits and proceeds as a court, and is undoubtedly, in fact and in law, a court.

Its Executive Functions.

These embrace the duties of the Commission in connection with the visitation of corporations, the enforcement of penalties adjudged against them, the issuance of charters, the assessment of property and franchise taxes, and a number of matters of a purely administrative character. Some of its executive powers and duties are necessarily so blended with the exercise of judgment and discretion, that it is difficult sometimes to draw any line of demarcation between what are distinctly executive and what are judicial.

IN ITS CREATION AND ORGANIZATION IT IS A VALID TRIBUNAL.

Any question as to the power of a *State legislature* to fix the rates which may be charged, and to prescribe the facilities and conveniences which shall be furnished by public service companies, has long since been put at rest in this country.

Munn vs. *Illinois*, 94 U. S., 113.
The Granger Cases, 94 U. S., 155.
The Railroad Commission Cases, 116 U. S., 307.
Smythe vs. *Ames*, 169 U. S., 523.
Minneapolis & St. L. R. R. Co. vs. *Minnesota*, 186 U. S., 257, and scores of other cases, Federal and State.

So also now in respect to any question as to the validity of a statute which confers or delegates this power upon a commission or other tribunal.

Railroad Commission Cases, 116 U. S., 307.
Reagan vs. *Farmers' Loan & Trust Co.*, 154 U. S., 362, 394, 413.
St. Louis, &c., R. R. Co. vs. *Gill*, 156 U. S., 658.
Smythe vs. *Ames*, 169 U. S., 524.
Minneapolis & St. L. R. R. Co. vs. *Minnesota*, 186 U. S., 257, and a large number of other cases, Federal and State.

No such question could ever have been raised as to a commission which, like the Virginia Commission, derives its powers, not from the General Assembly, but by grant from the people of the State, through their organic law.

Its powers, in so far as they are defined by the Virginia Constitution, are in no sense derivative, or delegated, but fundamental, and where devolved upon it by legislative enactment, are so conferred pursuant to express grant of authority and in obedience to the Constitution itself.

Virginia Constitution, Section 156, Clause (c). Appendix to this brief, and R. 86.

The authority of the Commission in respect to all matters within its jurisdiction, is "subject to the superior authority of the General Assembly," except the power conferred upon it, "to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies," as to which its authority is expressly made paramount to that of the General Assembly, *though subject to review on appeal to the Supreme Court of Appeals* of the Commonwealth.

Virginia Constitution, Sec. 156, Clause (b). Appendix to this brief, and R. 85.

The just regulation and control of public service companies and other common carriers, by competent public authority has proved to be one of the most difficult problems which has engaged the attention of lawmakers and jurists during the last fifty years of the history of our country.

While the legislature had the power to prescribe rates and charges and regulations, it was found to be impracticable for such a cumbrous body, consisting chiefly of members who, however intelligent and well qualified in other respects, had little practical information as to the operation of transportation companies, and who, meeting at long intervals in sessions of two or three months' duration, or less, with their minds engrossed by hundreds of other matters of more or less interest and importance, could give little or no intelligent attention to the details, or to the careful consideration of the subject, of the wise, and reasonable, and equitable control of these great agencies of modern commerce.

The problem was found to be one of so much intricacy and

difficulty, involving for its right adjustment so much special information, and such constant touch with the subject to be dealt with, that experience demonstrated that it was absolutely necessary to confide the exercise of these great powers and the discharge of the great public trust involved in their conscientious exercise, to able and trustworthy men, whose trained minds directed specially to the careful and painstaking study and consideration of all of the facts as to transportation and traffic conditions in their respective jurisdictions, would be enabled to deal with the subjects of rates, charges, and classification of traffic, and facilities, fairly and justly, both as to the rights of the public and as to the rights of the transportation companies.

Experience had also demonstrated that it was necessary, in order to give an adequate remedy for evils which were becoming intolerable, to clothe the tribunal which should be entrusted with these great duties and powers, substantially with some of the powers of a board of railway directors, for the Commission had practically to discharge some of the more important and difficult functions and duties of such a board—that is to give it, not only judicial and legislative, but executive and administrative powers; authority first to investigate, and proceeding judicially to hear testimony, and arguments of counsel, and considering the same, to adjudicate and determine what regulations or rates are reasonable and just, and then to enact such rates and regulations; and to clothe this tribunal also with farther judicial power to adjudge penalties for non-compliance with their lawful orders and enactments, and to enforce such penalties so as to compel such compliance.

There was another difficulty which had been suggested by the decisions of our highest courts, notably in the opinions of Judges Blatchford and Miller, in *C. M. & St. Paul R. R. Co.* vs. *Minnesota*, 134 U. S., 418, and in the decisions in *Inter-*

state Commerce Commission vs. *Cincinnati, &c., Ry. Co.*, 167 U. S., 505—namely, that while the fixing of rates is a legislative act, the determination of their reasonableness and justness is a judicial function, which, as was indicated in the Minnesota Case (134 U. S., *supra*) could be exercised properly only after giving the companies, whose rates and charges were to be prescribed, notice, a fair opportunity to be heard, to introduce testimony and to show cause, if any they could, why the rates proposed were unreasonable, unjust or destructive of their property rights. In other words, to give all transportation companies whose interests or rights might be prejudiced or affected by the proposed action, a day in court—and "due process of law."

It will be seen that it is simply impracticable, indeed, from the nature of things impossible, for any legislature, constituted as American legislatures are, to give any such hearings, or judicial consideration, and due process of law in any case whatever.

Nor would it be practicable for any such legislative body as the Virginia General Assembly, for example, meeting at long intervals, and sitting then for so brief a period, that its entire session amounts to only two months out of every twenty-four, to either properly deliberate upon and formulate its judgments, or adequately provide for, and from time to time, enforce compliance with them.

With equal cogency has experience demonstrated that the ordinary courts are unable to adequately, justly, or effectively regulate or control transportation companies in the discharge of their duties to the public and their charges therefor.

Such courts may pronounce any given rate or regulation invalid because confiscatory, or discriminatory and operating to deprive persons of the equal protection of the laws. They may give some such negative relief in specific cases; but they are

powerless to afford that adequate, positive and general relief which the situation often imperatively demands, or to deal effectively with conditions which can be met justly and effectively only by a tribunal which, though it shall act judicially and must act judicially, and must accord due process of law in the trial and consideration of all cases in which it shall exercise its special jurisdiction, is created for the purpose, the members of which are selected specifically for this very service, are in intimate touch with the subject with which they have to deal, and are given facilities and the command of agencies which enable them to be constantly and accurately informed as to the facts upon which an intelligent and just judgment in such matters must depend.

The Virginia State Corporation Commission, as created and defined by Article XII, of the Constitution, furnishes the most complete, and the most satisfactory solution of all of these difficulties, which has been as yet provided, and about as perfect a tribunal for justly and constitutionally and yet effectively dealing with these complex and important subjects, as has been as yet devised by the genius, and the high purpose of man.

The prime object in the creation of courts and in prescribing their jurisdiction, powers, course of procedure, and processes, should be to conserve and attain justice.

It is impossible to read the remarkable article of the Constitution in reference to corporations, without seeing that it was the purpose of its author and of its enactors to deal justly, and to act, uprightly, with the companies for whose proper regulation they provided, and with the public to whom it was the duty of those companies to render reasonable and efficient service for just and reasonable compensation.

And it is impossible for any intelligent and impartial mind to read Section 156 therein, and the Acts of Assembly passed

in effectuation thereof, and to consider the same in connection with the XIVth Amendment to the Federal Constitution, without being convinced that the purpose, meaning, and effect of that section and of those acts are:

I. To create a competent and impartial tribunal.

(1) With judicial authority and obligation to determine whether any proposed action of the Commission will be reasonable and just, after due notice, and the fullest reasonable optunity to the companies to be affected by any such proposed action, to be fairly heard, to introduce testimony, to be represented by counsel, and to show cause, if any they can, against the order, regulation or action proposed.

(2) With legislative authority (but proceeding judicially, and with due process of law, where any property rights are involved), to enact just rules and regulations for the government of transportation and transmission companies in respect to the services they should render the public and the fair and reasonable compensation they should receive therefor.

(3) With an absolute right of appeal to any company or individual aggrieved by any action or order of the Commission, to the Supreme Court of Appeals of the State, which is empowered to give adequate and complete relief and redress against any action or order of the Commission which may violate the rights of any person so appealing.

II. If, by any order of the Commission it shall deny to any person or corporation the equal protection of the laws, or deprive them of their property without due process of law by operating so as to confiscate such property, and adequate redress and relief shall be denied such citizen or corporation by the Supreme Court of Appeals of Virginia, then the person or com-

pany so aggrieved may carry the case to the Supreme Court of the United States and have that court review, and, if found erroneous, reverse both the order and judgment of the State Court of Appeals, and the order or action of the Commission, and give such relief as may be just and right.

III. From the inception of the proceeding, and in every stage of it, "due process of law" is more carefully provided for, and is more certainly secured, than it has been by any constitutional or legislative enactment in reference to this subject as yet adopted by any other State of the American Union, including those which have received the sanction of the highest courts, State and Federal.

Here we have an admirable exemplification of that safeguard of liberty—commended by jurists and statesmen—the "check of power upon power." As to a large part of its functions, both the General Assembly and the highest courts of the State, and of the Nation, are, or may be, powerful checks upon the authority, and upon any action of the Commission; and as to the matters in regard to which its original jurisdiction is paramount, any act of the Commission is subject to the supervision of, and to review, reversal or correction by these courts, upon appeal.

If the Railroad Commissions of Mississippi, of Texas, and of Minnesota, and the statutes creating those commissions, are legal and valid, as they have been held to be by the courts of last resort, then *a fortiori* are the Virginia Corporation Commission and the organic and legislative enactments which define its powers and duties, unquestionably valid and constitutional.

There is a ground of objection urged by complainants in their bills to the validity of Sections 155 and 156 of the Virginia Constitution, and of the State Corporation Commission,

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to which the foregoing argument may not be considered a complete answer.

That objection is, that in so far as the Constitution and laws of Virginia subject such companies in the matter of their public duties and charges to the control of a commission clothed with legislative and executive, as well as judicial functions, and deny to them access to the law courts of the State, which are not clothed with executive and legislative functions, such as every other person, private or corporate, within the jurisdiction of said State hath, said Constitution and acts made a discrimination against said transporation companies and deny them the equal protection of the laws, and deprive them of their property without due process of law.

To this, a sufficient reply is, that there is no denial of the equal protection of the laws, when all persons in like condition and under like circumstances are treated in the same way, made liable to the same regulations and subjected to the same penalties for failure to comply with the just requirements of such regulations.

The jurisdiction complained of applies alike to all companies and persons engaged in the business of transportation (Section 153 of Constitution), and there is no discrimination whatever against any railroad or other transportation company, or in favor of any person, who engages in the business of a common carrier. All stand alike, and are dealt with alike, with due process of law.

> "Equal protection of the laws is not denied by a law, or course of procedure, which would have been applied to any other person in the State under similar circumstances and conditions."

Tinsley vs. *Anderson,* 171 U. S., Syllabus, p. 101, and opinion of court by Chief Justice Fuller, p. 106.

If the contention of complainants' counsel in this regard is well founded, then it would be impossible ever in any way, lawfully to regulate and control any railway company or other common carrier.

If it were attempted to regulate and control them as has been done in many cases, by direct legislative enactment, they could claim with equal plausibility, as here, that such act was discriminatory, and denied them the equal protection of the laws, because it, and the penalties it imposed, were directed at common carriers and railway companies only, among all the persons and corporations in the State.

If the law applies to all persons or classes of persons under similar circumstances and conditions, it will not be repugnant to the inhibition that, "No State shall deny to any person within its jurisdiction the equal protection of the laws."

This is *the effect* of the decisions in which State Railroad Commissions have been sustained by the United States Supreme Court as valid and constitutional tribunals, and those cases are conclusive of the question here.

Railroad Commission Cases, 116 U. S., 307.

Reagan vs. *Farmers' Loan & Trust Co.*, 154 U. S., 362, 394, 413.

St. Louis, &c., R. R. Co. vs. *Gill*, 156 U. S., 658.

Smythe vs. *Ames*, 169 U. S., 524.

Minneapolis & St. Louis R. R. Co. vs. *Minnesota*, 186 U. S., 257.

The above stated principle has been repeatedly expressly sanctioned by the United States Supreme Court in a number of other cases.

Missouri R. R. Co. vs. *Mackey*, 127 U. S., 209.

Barbier vs. *Conally*, 113 U. S., 32.

Soon Hing vs. *Crowley,* 113 U. S., 703.

Kentucky Railway Tax Cases, 115 U. S., 321.

Home Insurance Company vs. *New York,* 134 U. S., 606.

Tinsley vs. *Anderson,* 171 U. S., 106.

Orient Insurance Company vs. *Daggs,* 172 U. S., 557-562.

Atchison, Topeka & Sante Fe R. R. Co. vs. *Matthews,* 174 U. S., 95.

Fischer vs. *St. Louis,* 194 U. S., 361.

Fidelity Mutual Life Association vs. *Mettler,* 185 U. S., 308, 325, 327.

Mr. Justice Harlan and Mr. Justice Brown dissented in the last cited case, not as to the correctness of the principle, but upon its application to that case, in which it was held in the dissenting opinion by Judge Harlan, that the classification made by the Texas statute was arbitrary and unequal in its operation as between corporations doing business under like conditions, and therefore operated to deny the plaintiff in error the equal protection of the laws.

The only difference between the case presented here, and one which might arise under an act of regulation enacted by a General Assembly, is that the act complained of here is the judgment and act of a tribunal, which is given by the Constitution limited legislative power, and within those limits is a special legislature of the State, and which is also given judicial power, which it must exercise, and which, in this case, has been exercised so as to protect the complainants against the possibility of being deprived of their property without due process of law.

In the tribunal, the validity of which is sought to be impeached, the complainants have been given a full and fair trial of their case, such as it would have been impracticable for the General Assembly to have accorded them had that body been

empowered to exercise authority and control over such matters; and yet it is of these very provisions which place the complainants in a very much better position than they would be had these powers been left with the General Assembly, that they here complain.

The very best answer to and refutation of their contention is the record in this case, which absolutely disproves the averment that the complainants have been denied the equal protection of the laws or deprived of their property without due process of law.

The notice given to them of the proceeding instituted against them, the ample opportunity given them to be fully heard before the Commission, to introduce the testimony of their witnesses, and their documentary evidence, to be represented by able counsel both in the examination and the cross-examination of witnesses in proceedings continued through many months, and in the argument of the case before the Commission, and their right of appeal, all demonstrate that there have been accorded to them, in the fullest sense, the equal protection of the laws, and due process of law.

If there could be any doubt about this, it has been removed by the decisions of the Supreme Court of the United States in the cases in which the validity of State statutes, establishing such commissions and giving them authority and jurisdiction for the control and regulation of transportation companies, have been repeatedly affirmed, in cases, some of which are cited above.

We challenge the most careful scrutiny of Sections 155 and 156 of the Constitution of the Commonwealth, and the statutes enacted in effectuation thereof, so that the court may see how fully their terms sustain the argument here made in their vindication, and how completely they refute the charges which counsel make against them.

I have thus endeavored to show upon principles that are so elementary and axiomatic that they need no support of adjudicated cases, that the Virginia Corporation Commission is a valid and constitutional tribunal.

It is fortunate for my cause, and for the right, that the main question I have discussed has been passed upon by this court of last resort, upon this subject, and that its adjudications are in accordance with the view which I have endeavored to maintain.

The great importance of this question makes it proper that some of the most important of these adjudications shall be briefly reviewed.

In *Spring Valley Water Works* vs. *Schottler,* 110 U. S., 347, 354, the court held that, under the Constitution and laws of Kansas it was competent for the board of supervisors of a town of which it was the governing body, and therefore clothed with general municipal legislative functions, to fix and determine what were the just and reasonable charges to be made for water to the people of such town by a water company. In that case the court said that:

> "By the Constitution and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and the company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the legislature for such purpose, their duties are judicial in their nature, and they are bound in morals and in *law* to exercise an honest judgment as to all matters submitted for their official determination."

Here the determination of what was a just charge to be made for water was vested in the municipal legislature, which, in making this determination, acted judicially, and in enacting it, acted legislatively. Here there was the union of both legislative and judicial powers in the same body.

In *Chicago, Burlington & Quincy R. R. Co.* vs. *Nebraska,* 170 U. S., 57, 75, 76, the court sustained an act which delegated to the council—the legislative body of the City of Omaha—the duty and the power of making an apportionment of the cost of a viaduct, which, for the safety of inhabitants of such city, was required to be built over the tracks and roadways of several railroad companies—between said companies, and determining in what proportion said companies should be required to contribute to the cost of building and maintaining such causeway.

In *Louisville and Nashville Railroad Company* vs. *Kentucky,* 183 U. S., 503, the court sanctioned and sustained the Kentucky Railroad Commission as a valid tribunal, clothed with administrative and also with a discretion judicial in its character.

In *Riverside Oil Company* vs. *Hitchcock,* 190 U. S., 316, 324, the court sanctions the validity of Acts of Congress which confer both executive and judicial functions upon the Land Department of the United States government.

The court said:

> "Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.
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> "Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Marquez* vs. *Frisbie,* 101 U. S., 473; *Gaines* vs. *Thompson,* 7 Wall, 347; *United States* vs. *Black,* 128 U. S., 40; *United States* vs. *Windom,* 137 U. S., 636."
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> "In *Decatur* vs. *Paulding,* 14 Pet., 497, it was held that, in general, the official duties of the head of one

> of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolution of Congress, under which he is, from time to time, required to act."

See also *Bates & Guild Co.* vs. *Payne,* 194 U. S., 106, 108, 109, and *Public Clearing House* vs. *Coyne,* 194 U. S., 497, 508-509, as to the power of the Postmaster General or other executive officer of the government, to decide questions of law, and also mixed questions of law and fact.

But the United States Supreme Court has still farther cleared the question presented in this case of difficulty, for it has decided not only that it is competent for a State to unite in one board or tribunal some of the legislative, executive, and judicial powers of government, but that when a State does this, *it violates no prohibition of the Federal Constitution; that an act of a State which confers legislative, executive, and judicial powers upon a functionary or official body does not present any Federal question;* that any such question is one for the determination of the State, and upon it the decision of the State courts is *final, and is accepted by the United States Supreme Court as final.*

This doctrine, as well as the proposition that it is competent for the States to clothe an officer or body of officers with some of the powers of two or of all three of the great departments of government, is well supported by the following decisions:

In *Dreyer* vs. *Illinois,* 187 U. S., 57, 84, Mr. Justice Harlan delivering the unanimous opinion of the court, says:

"Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State, and its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.' Story's Const. (5th Ed.), 393. Again: 'Indeed, there is not a single constitution of any State in the Union, which does not practically embrace some acknowledgment of the maxim and at the same time some admixture of powers constituting an exception to it.' Story's Const. (5th Ed.), 395."

Attention is invited to Judge Story's admirable statement of the doctrine for which we contend, here adopted by this court.

The court in *Reetz* vs. *Michigan*, 188 U. S., 505, 507, Mr. Justice Brewer, delivering its opinion, so far as any Federal question was presented, upheld a State statute which conferred judicial powers upon an executive board, but decided that any question as to the validity of the act creating such a board was a State question as to which the decision of the State courts was conclusive.

Among other things pertinent to this case, the learned judge says:

> "It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision, inasmuch as it may refuse a certificate of registration if it shall find that no sufficient proof is presented that the applicant had been legally registered under Act No. 167 of 1883. That, it is contended, is the determination of a legal question which no tribunal other than a regularly organized court can be empowered to decide. The decision of the State Supreme Court is conclusive that the act does not conflict with the State Constitution, and we know of no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers, of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process."

Such questions and analagous questions were held to be State and not Federal questions, in

Hibben vs. *Smith*, 191 U. S., 310, 321.

French vs. *Barber Asphalt Paving Co.*, 181 U. S., 324, 327 to 337.

And in a number of cases exhaustively reviewed in the last case cited, particularly the cases summarized at pages 335 and 336.

In *Lieberman* vs. *Van De Carr*, decided December 11, 1905, 199 U. S., 552-562, 563, the court sanctions an ordinance of the City of New York which confers judicial, or *quasi* judicial, powers upon an executive board, and holds that such matters were matters which properly came within the jurisdiction of the authorities of the State—the court declaring that:

"In such cases it is the settled doctrine of this court that no Federal right is invaded, and no authority exists for declaring a law unconstitutional, duly passed by the legislative authority and approved by the highest court of the State. Nor do we think there is force in the contention that the appellant has been denied the equal protection of the laws, because of the allegation that the milk business is the only business dealing in foods which is thus regulated by the sanitary code. All milk dealers within the city are equally affected by the regulations of the sanitary code. It is primarily for the State to select the kinds of business which shall be the subjects of regulation, and if the business affected is one which may be properly the subject of such legislation, it is no valid objection that similar regulations are not imposed upon other businesses of a different kind. *Soon Hing* vs. *Crowley*, 113 U. S:, 703; *Fischer* vs. *St. Louis*, 194 U. S., 361."

If anything more was needed to bring these cases entirely within the reason, the letter and the spirit of the repeated adjudications of the Supreme Court of the United States, it is furnished by the circumstance that the constitutionality and validity of the State Corporation Commission were sanctioned and established by the final judgment and decision of the Supreme Court of Appeals of Virginia in *Winchester and Strasburg R. R. Co. &c.* vs. *The Commonwealth*, rendered December 6, 1906; 55 S. E. Rep., 692; 106 Va., 264. The very grounds of attack which are here made upon that tribunal, and upon its judgment and order complained of here, were made in that case, and the court fully sustained the constitutionality of the Commission, and the validity of its judgments and acts within the scope of its jurisdiction.

The opinion of the Virginia Supreme Court in that case was a final adjudication of the main question attempted to be again raised in these cases, both as to the State and as to the Federal courts.

That decision is of such importance in its bearings upon these cases that so much of the able and conclusive opinion of the court as is pertinent to the questions presented here will be printed in the Appendix to this brief.

The decision of the highest court of the State as to the validity and as to the constitutionality of a State law, whether statutory or organic, is final, and will be accepted by the Federal courts, except when the State law conflicts with some provision of the Federal Constitution. As was decided by the United States Supreme Court in *Dreyer* vs. *Illinois,* 187 U. S., 57, 84 (*supra*), such questions as are presented here are questions for the determination of the State, and raise no inquiry as to whether due protection of the laws was denied. In such cases no Federal question is presented, and the decisions of the State courts are final.

Satterlee vs. *Mathewson,* 2 Pet., 380.
Withers vs. *Buckley,* 20 How., 84.
Atlantic & Gulf R. R. Co. vs. *Georgia,* 98 U. S., 359.
Re Duncan, 139 U. S., 449.
Fallbrook Irrigation District vs. *Bradley,* 164 U. S., 111.
Porter vs. *Foley,* 24 How., 415.
Rippey vs. *Texas,* 193 U. S., 504-510.

And the Supreme Court of the United States has, as we have seen, decided that the fact that legislative, executive, and judicial powers are conferred by a State law upon a board, or official body, does not present any Federal question; that such a State statute is not in conflict with the Constitution of the United States.

Reetz vs. *Michigan; Lieberman* vs. *Van De Carr,* and *Dreyer* vs. *Illinois, supra.*

The following out of a great number of State adjudications to the same effect are referred to, upon questions of "due process of law" and the "equal protection of the laws."

Westervelt vs. *Gregg*, 12 N. Y., 202-209.

State vs. *Griffin*, 69 N. H., 1.

Newark and South Orange Horse-Car Railway Co., vs. *Hunt, Etc.*, 50 N. J. L., 308, 312-313.

Health Department vs. *Trinity Church*, 145 N. Y., 32.

State vs. *Sponaugle*, 45 W. Va., —; 43 L. R. A., 727.

Atty. General vs. *Jochim*, 99 Mich., 358; 41 Am. St. Rep., 606.

Ruggles vs. *People*, 91 Ill., 256.

Parker vs. *Metropolitan Co.*, 109 Mass., 507.

Railway Co. vs. *Railway Co.*, 30 Ohio St., 604.

Harding vs. *People*, 106 Ill., 459; 32 L. R. A., p. 445.

C. B. & Q. R. R. Co. vs. *Jones*, 149 Ill., 361; 24 L. R. A., 141.

The only authority which I have been able to find which is at all in conflict with the foregoing views, is the decision of the United States Circuit Court for the District of Kansas, rendered by Judge Hook (District Judge), November 27, 1899, and reported in 98 Federal Reporter, pp. 340-361. The opinion is an able discussion of the question as it was presented in that case, and holds that an act of Kansas which established a "Court of Visitation" and conferred upon it the general power of regulating the business of railroad and telegraph lines in that State, and clothed it with legislative and judicial powers for this purpose, was an unconstitutional statute.

1. Because in conflict with the Constitution of Kansas as interpreted by the highest court of that State.

2. Because it operated to deprive the companies affected of their property without due process of law.

In so far as that decision was based upon the provisions of the Constitution of Kansas, and the decisions of the courts of that State, it has no relevancy to the case at bar, and is not obnoxious to criticism.

In so far as it holds the conferring of legislative and judicial powers, by a State law, upon a tribunal charged with the duty of regulating railroad and telegraph companies to be in conflict with the XIVth Amendment to the United States Constitution, the case is overruled by repeated decision of the United States Supreme Court above cited, and cannot be sustained upon principle.

We have now considered the main grounds upon which the plaintiffs in these suits base their attack upon the judgment and order of the State Corporation Commission complained of by them, namely, that that Commission is an illegal tribunal, and its judgments and acts nullities for the reason that the very constitution and *modus operandi* of the Commission operate to deprive the plaintiffs of their property without due process of law, and to deny them the equal protection of the laws; and we have seen that this contention is without any just foundation in fact or in law.

The only other ground upon which such an organic department of a State government could by possibility be obnoxious to any provision of the Federal Constitution, must be the claim, that a department of a State government so constituted renders the government of which it is a constituent part, not "republican in form," within the meaning of Section 4, of Article IV of the United States Constitution, which provides that:

> "The United States shall guarantee to every State of this Union a Republican Form of Government."

We deny that there is any just basis for any such suggestion.

As has been already shown, there is nothing unrepublican in an article in a State Constitution which gives to a Commission the power of justly regulating and controlling public service companies, in respect to their rates and charges for transportation, just as such powers have from the beginning of free parliamentary government been exercised as an essential prerogative of government by the legislatures of the English-speaking races, or by tribunals invested by those legislatures with such powers.

There is nothing unrepublican in devolving upon an impartial tribunal, constituted as the Virginia Commission is, legislative powers, and requiring that these powers shall be exercised upon a judgment and determination reached judicially; and that in its proceedings it shall sit, and act as a court, accord due process of law, and adopt all appropriate judicial process, so that it shall not, by acting arbitrarily, do injustice to any one.

But, even if it were true, as is contended by complainants' counsel, that the government of Virginia is made unrepublican in form by reason of the engrafting upon it by Article XII of the Constitution of the State, the Corporation Commission, as a constituent co-ordinate department of government, then, such a state of facts would present no justiciable question of which this or any other court would have any jurisdiction.

Such a question is one distinctly outside of the domain of judicial determination. It is a purely political question, which can only be determined by the political departments of the government, that is, by Congress—for Congress alone represents and can act for the United States in matters of such a distinctly political character, and of such great political importance.

This is settled beyond peradventure by the adjudications of the United States Supreme Court.

In *Luther* vs. *Borden,* that Court said:

> "The fourth section of the fourth article of the Constitution of the United States, provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."
>
> "Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican form of government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. * * * It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators nor representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Opinion of the Court in *Luther* vs. *Borden,* 7 Howard, 42; Id., 39, 44, 47.

Cited and approved in *Texas* vs. *White,* 7 Wall., 700.

Cited and approved in *Duncan* vs. *McCall,* 139 U. S., 499-461.

Cited and approved in *Taylor* vs. *Beckham,* 178 U. S., 547-579.

So that the ground just considered, if it had any basis whatever in fact, would not furnish any foundation whatever for the jurisdiction of this court in the cases presented by the bills in these suits.

III.

We come now to consider what seems to me to be a decisive question in this discussion—namely:

Did the United States Circuit Court for the Eastern District of Virginia have or rightfully take jurisdiction of these cases?

An answer to this inquiry turns upon the question, whether the Virginia State Corporation Commission is to be regarded as a court in respect to its judgment, order, and proceedings here sought to be stayed by injunction.

By Section 720 of the Revised Statutes of the United States, expressing in explicit terms the comity which should always prevail between courts of justice and particularly the National and the State courts, the due observance of which is not only promotive of that harmony which should prevail between the tribunals of the States and of the Nation, of which the States are integral and component parts, but is essential to the due and orderly administration of justice, it is enacted as follows:

> "Sec. 720. INJUNCTION TO STAY PROCEEDINGS IN STATE COURTS.—The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This statute is simply "declaratory of an existing rule of comity and necessity."

It has again and again received the unqualified sanction of the Supreme Court of the United States, in cases, some of which will be mentioned later on, but it will not be amiss to here quote from one of the earlier adjudications of that court upon the subject.

In the case of *Peck et al* vs. *Jenness et al*, 7 Howard, 612,

625, this court held as to the principle expressed in this statute as follows:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy* vs. *The Earl of Cassilis*, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."
>
> "The language of Section 720 is plain, and the decisions are uniform that, with the single exception named in the Section," (namely, cases where such injunction may be authorized by any law relating to proceedings in bankruptcy), "a bill will not lie in a Federal court to stay pending proceedings in any court of a State." 16 C. C. A., p. 91, citing:

Diggs vs. *Wolcott,* 4 Cranch, 179; *Peck* vs. *Jenness,* 7 How., 620; *Haines* vs. *Carpenter,* 91 U. S. 255; *Dial* vs. *Reynolds,* 96 U. S. 340; The Mamie, 110 U. S. 742; *Whitney* vs. *Wilder,* 4 C. C. A., 510, 54 Fed., 554; *Chaffin* vs. *St. Louis,* Fed. Cas. No. 2,572; *Bank* vs. *Skelton,* Id. 2,739; *Bank* vs. *Bentz,* 59 Fed. 645; *Dillon* vs. *Railway Co.,* 43 Fed. 109; *Railway Co.* vs. *Scott,* 13 Fed. 793; *Molony* vs. *Association,* 53 Fed. 209. And see note by Mr. William L. Clark on page 91 to 93 of 16 C. C. A., from which the above quotation is copied, where the general scope of Section 720 is fully discussed.

The principle was farther sanctioned and enforced in *Harkrader* vs. *Wadley,* 172 U. S., 148.

To the same effect was the decision *United States* vs. *Parkhurst-Davis Mercantile Company,* 176 U. S., 317.

In the last cited case the court adopts the following significant language from its previous decision in *Haines* vs. *Carpenter,* 91 U. S., 254-257, which applies with singular appropriateness to the cases now under argument:

> "In the first place, the great object of the suit is to enjoin and stop litigation in the State courts, and to bring all the litigated questions before the circuit court. *This is one of the things which the Federal courts are expressly prohibited from doing.* By the Act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a State court. This prohibition is repeated in Section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law."

A pertinent inquiry in these cases, therefore, is, whether the Virginia Corporation Commission, when it sat in "The Passenger Rate Case," and entered its order of the 27th of April last therein, was a court within the intendment of Section 720, and of the salutary doctrine therein expressed?

An examination of Sections 155 and 156 of the Constitu-

tion of Virginia, and of the statutes of the State, which define the functions, powers, and duties of the Commission, and of the Rules of Practice and Procedure adopted by the Commission, copies of which are filed with the answers of defendants, will demonstrate that it is thereby constituted a court whenever it sits for the hearing and decision of cases such as that in which its order here complained of was entered; that it was required to sit as a court, had all of the insignia, and observed the rules of practice, and the process of a court; and an examination of the record of the case, the trial of which before said Commission resulted in said order of April 27, 1907, will show that the Commission in all of its procedure in connection with said trial, acted as a court, and was a court *in fact*, as under the Constitution and laws of the State it was within the meaning of Section 720 of the United States Revised Statutes, a court *in law*.

The definitions of a court, as given by law-writers and lexicographers, are various, but it will be found that the tribunal whose orders the plaintiffs in these suits seek to nullify, satisfies all of the essential requisites of a court of justice as given by these authorities.

Webster's Dictionary gives the following among other definitions, not applicable to a court empowered to hear and decide cases:

> * * * "A judge or judges sitting for the hearing or trial of cases. (c) A tribunal established for the administration of justice." * * *
> "8. Any jurisdiction civil, military, or ecclesiastical."

The Century Dictionary gives the following:

> "7. In law a tribunal duly constituted, and present at a time and place fixed pursuant to law, for the judicial investigation and determination of controversies."

"8. Any jurisdiction, customary, ecclesiastical, or military, conferring the power of trial for offenses, the redress of wrongs, etc."

Standard Dictionary the following:

"Court, I. Law. (1) A place where justice is judicially administered.
(2) A tribunal duly constituted to administer justice.
(4) Any body possessing judicial jurisdiction, civil, military, or ecclesiastical."

Blackstone says:

"In every court there must be at least three constituent parts, the *actor, reus,* and *judex;* the *actor,* or plaintiff, who complains of an injury done; the *reus,* or defendant, who is called on to make satisfaction for it; and the *judex,* or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy."

"It is also usual in the superior courts to have attorneys and advocates or counsel, as assistants." 3 Blackst. Com., p. 25.

"A court of record is that where the acts and judicial proceedings are enrolled on parchment for a perpetual memorial and testimony; which rolls are called the records of the court, and are of such high and supereminent authority that their truth is not to be called in question." *Id.* p. 24.

Upon an examination, however thorough, if fairly made, it will be found that the Virginia Corporation Commission, in respect to its acts and functions which are the subject of the present inquiry, comes entirely within all of the above requisites for a court, substantially satisfying even the exceedingly narrow and technical definition given by Blackstone.

In every case in which it sits as a court, there are an *actor*

or complainant, a *reus* or defendant, and *judices* or "judicial power," represented by the Commissioners, who are in respect to this tribunal, judges, administering justice judicially and "with due process of law."

As to what constitutes a court, see *Fuller and Others* vs. *County of Colfax,* 4 McCrary, 536-7.

It is not, of course, the name by which a tribunal is called, but the powers, duties, and functions which are devolved upon it, and which it exercises, which determine its character.

If these are judicial, the tribunal is a judicial tribunal, and a judicial tribunal is a court, whatever its name may be.

If the tribunal is not only judicial in its attributes, but if it has a clerk, and keeps a record of its decisions, orders, and judgments, it is a court of record.

It may be, as is the case with the Virginia State Corporation Commission, a tribunal of limited jurisdiction, but if it is clothed with and exercises judicial powers and functions, it is none the less a court. The extent of its jurisdiction does not at all affect its judicial character. It is its judicial characteristics and attributes which determine whether it is or is not a court.

The Legislature of Massachusetts is designated by the Constitution of that Commonwealth, "The General Court of Massachusetts," Chapter 1, Sec. 1, Art. 1, of Constitution of Massachusetts, a name which is not now descriptive of its character.

It consists of a Senate and House of Representatives, and is expressly clothed with the law-making power of the Commonwealth. Though it is by name "The General Court," it is in fact and in law the Legislature of Massachusetts, and is not a judicial tribunal, and therefore not a court in the sense in which that term is used in Section 720.

And yet, the Senate of Massachusetts, as is true of the

Senate of Virginia, and of other States, though a branch of the State Legislature, nevertheless, when it sits for the trial of impeachments, it is a court; and the mandate of Section 720 of United States Statutes would apply to, and protect a State Senate, when so sitting, and deny to any United States court the power by injunction to stay the proceedings and acts done in the exercise of its powers and duties as such a court.

So we see that the nature of a tribunal in respect to its judicial character is not at all controlled by its name. The General Court of Massachusetts is distinctly a *Legislature,* and not a court. A State Senate sitting for the trial of impeachments, is a court, though its name may still import legislative authority only.

A brief review of the characteristics and attributes of this Virginia Commission will be here helpful in showing what its real nature is.

> "At least one of the commissioners shall have the qualifications prescribed for judges of the Supreme Court of Appeals; and any commissioner may be impeached or removed in the manner provided for the impeachment or removal of a judge of said court." Va. Const., Sec. 155. R. 83.

It can only proceed and act after due notice, and must proceed and act as a court of justice.

> "Before the Commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable

opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the Commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement." Va. Const., Sub-Sec. (b) of Sec. 156. R. 85.

It is given the power and authority of a court of record, and sits as such court.

"In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visita-

tion, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally." Va. Const., Sub-Sec. (c) of Sec. 156. R. 86.

Its orders are protected from collateral attack and made final, and cannot be brought in question or reviewed except upon appeal to the Supreme Court of Appeals of the State, to which an appeal can be taken *of right*.

The Commission has all of the official staff of a court.

> "The Commission * * * shall have one clerk, one bailiff, and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed and subject to removal by the Commission." Va. Const., Sec. 155. R. 83.

See, also, Section 7 of

"Chap. 147.—An ACT to put into effective operation the provisions of the Constitution relating to the creation, appointment and organization of the "State Corporation Commission," its jurisdiction, powers, functions and duties; the qualification of the members and officers thereof, their appointment and salaries; the location of its offices, and places and times of its public sessions; *its writs, processes, orders, findings and judgments; appeals from its orders, findings and judgments, and its expenses, etc.* Approved April 15, 1903." R. 93, and Appendix.

It is made a court of record.

In Section 11 of the Act just cited it is provided:

> "11. That the clerk of the commission shall keep a minute book in which shall be recorded all the proceed-

ings, orders, findings and judgments of the public sessions of the Commission, and the minutes of the proceedings of each day's public session shall be read and approved by the Commission and signed by its chairman or acting chairman; he shall, subject to the supervision and control of the Commission, have custody of and preserve all of the records, documents, papers and files of the Commission, or which may be filed before it in any complaint, proceedings, contest or controversy, and said records, documents, papers and files shall be open to public examination in the office of said clerk to the same extent as the records and files of the courts of this Commonwealth." R. 94.

Its bailiff is its executive officer, and is invested with the powers of a sheriff or sergeant.

"13. That the bailiff of the Commission shall, in all matters within the jurisdiction of the Commission, have the powers, discharge the functions, and perform the duties of a sheriff or sergeant under the law; he shall preserve order during the public sessions of the Commission, and may make arrests and serve and make return on any writ or process awarded by the commission, and execute any writ, order, or process of execution awarded upon the findings or judgments of the Commission in any matter within its jurisdiction." Section 13 of Act of April 15, 1903, above cited. R. 95.

It is as to its mode of procedure, required to proceed with the same formalities, and is given the powers of, and is expressly made a court of record.

"22. That in all complaints, proceedings, contests, or controversies by or before the Commission, whether instituted by the Commonwealth or by the Commission of its own motion, the Commonwealth shall be complainant, and the party against whom the complaint is preferred, or the proceeding instituted, shall be the defendant. Any party complainant or defendant in any complaint, proceeding, contest or controversy shall be entitled to pro-

cess, to convene parties compel the attendance of witnesses, or the production of books and papers, in any proceeding or hearing before the Commission.

23. That the Commission, on hearing of all complaints, proceedings, contests, or controverseries, in which it shall be called upon to decide or render judgment in its capacity as a court of record, shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of this Commonwealth, in like manner as complainants and defendants in the courts of this Commonwealth.

24. That any person who shall wilfully swear falsely touching any material fact or matter in any complaint, proceeding, investigation, contest or controversy instituted or pending before the Commission shall be deemed guilty of perjury.

25. That the Commission shall cause its rules of order and procedure to be entered upon the records of its proceedings and to be printed, as well as all amendments and additions to the same, and shall furnish copies thereof to county and city clerks and to any citizen of this State upon application therefor.

27. The Commission shall have power and authority in all matters of which it has jurisdiction under the Constitution or the laws of this Commonwealth, to render and enter up judgment for fines and penalties, or for the recovery of money, in any complaint, proceeding, contest or controversy, whether instituted of its own motion or otherwise, and to issue process of execution thereon, which may be levied and executed in like manner as executions awarded and issued upon the judgments or decrees of the courts of law or equity of this Commonwealth. All judgments of the Commission for fines or penalties, for contempt, or for violation of any provision of the Constitution or the laws of this State, or for the failure or refusal of any corporation to obey and observe the lawful rules, regulations or orders of the Commission, shall be entered up in favor of the Commonwealth, and when collected shall be paid by the clerk of the Commission into the treasury, as hereinbefore provided.

28. The Commission shall have powers and jurisdiction possessed and exercised under the law by the courts of record of this Commonwealth to punish for contempt by fine or imprisonment, or by both, any person duly summoned to appear and testify before the Commission who shall fail or refuse to appear and testify, without a lawful excuse, or who shall refuse to answer any proper question propounded to him by the Commission in the discharge of its duty, or who shall conduct himself in a rude, disrespectful or disorderly manner before the Commission or any of them, deliberating in the discharge of duty in public session, and may for any such contempt impose the same penalties, either by fine or imprisonment or both, and render and enter up judgment in any such proceeding and enforce the same by process of execution or commitment to jail, or both, in the same manner and by like process and proceedings, and to the same extent, as may by law be done by any of the courts of this Commonwealth. The Commission may commit any person adjudged by it guilty of contempt to the jail of any city or county in the Commonwealth, and the jailer thereof shall receive such person upon the commitment of the Commission, attested by its clerk, first assistant clerk or acting clerk, and confine such person in the jail of his city or county, as the case may be, for the term of imprisonment specified in the commitment, unless sooner discharged therefrom by due process of law. The said jailer shall receive for the board of any person so committed the same allowance made by law for other persons confined in such jail, which shall be paid out of the public treasury upon the allowance of the Commission, certified as hereinbefore provided. The fines and judgments of the Commission in any contempt proceeding may be reviewed, affirmed, reversed or modified, as justice may require, on writ of error from the Commission to Supreme Court of Appeals.

29. That the Commission shall, in all matters within its jurisdiction, have the power and authority to award and issue, have served, executed and returned, any writ, notice, process, order or order of publication which may by law be awarded, issued, served, executed or returned by or to any court of law or equity in this Commonwealth, for the purpose of compelling the attendance

of witnesses, the production of books and papers, the convening of parties or the enforcement and execution of its findings, orders or judgments.

30. That all writs, processes and orders of the Commission shall run in the name of the Commonwealth, and shall be attested by its clerk, or first assistant clerk, or acting clerk, and shall be directed to its bailiff, and may be served, executed and returned by the said bailiff, in any city or county of this State, or by the sergeant or sheriff, or any constable, of any city or county in this State within his bailiwick. All writs, notices, processes or orders of the Commission may be served, executed and returned in like manner and upon like persons or property as the process, writs, notices or orders of the courts of record of this Commonwealth, and when so served, executed and returned shall have the same legal effect. The bailiff or other officer serving or executing any writ, notice, process or order of the Commission shall receive the same fees and commissions allowed by law for like services to the sergeants and sheriffs of the cities and counties of this State: Provided, that the bailiff of the Commission shall account for and pay to its clerk all fees and commissions received by him for any services which he may render, which shall be accounted for and paid by the clerk of the Commission into the treasury, as hereinbefore provided. The bailiff, or any other officer hereinbefore named, who shall fail to execute and return any writ, notice, process or order of the Commission, shall be subject to the penalties prescribed by law for failure to execute and return the process of any court, which penalties may be enforced by the judgment of the Commission.

31. That the Commission shall cause to be taxed and collected in all complaints, proceedings, contests or controversies instituted or pending before it, like fees and costs taxed and collected for like services by the officers of the courts of this Commonwealth; also the fees and mileage of witnesses attending upon its public sessions, and may enter judgment for the same and issue execution thereon, which execution may be levied and executed in like manner as execution issued upon the judgment or decree of the courts of law or equity of this

Commonwealth: Provided, that no costs shall be taxed or collected against the Commonwealth, except on appeals of corporations under the provisions of section one hundred and eighty of the Constitution which have been aggrieved by the assessments and ascertainments made by the Commission under section one hundred and seventy-six and one hundred and seventy-eight of the Constitution.

32. That the judgments of the Commission for the recovery of money, fines, or penalties shall be a lien on the real estate of the judgment debtor when duly docketed and indexed in the judgment lien docket as the judgments of the courts of record are required by law to be docketed and indexed, in the county or city in which the real estate of the judgment debtor is located, and the lien of such judgment may be enforced in equity before any court having jurisdiction to enforce liens. The clerks of the courts of the several cities and counties shall docket all such judgments on the lien docket of their respective courts when a copy thereof, certified by the clerk of the Commission, shall be presented for that purpose.

33. That the sessions of the Commission for the hearing of any complaint, proceeding, contest, or controversy instituted or pending before it, whether of its own motion or otherwise, shall be public, and its findings, decisions, and judgments shall be announced and rendered in public session. The judgments of the Commission for fines or penalties, or for the recovery of money, shall take effect as of the date of such judgment, and when allowed by the Commission in its order and entered up, the judgment shall bear interest from that date. The Commission may, by its rules, provide for the number of its regular public sessions in each year, the time of their commencement, their duration, and for their adjournment; and may also provide for extra or special public sessions when, in their judgment, such extra or special public sessions may be necessary or required. The Commission shall hold at least one regular public session in every three months in each year.

34. That the Commonwealth or any party aggrieved by any final finding, order, or judgment of the Commission shall have, of right, regardless of the amount in-

volved, an appeal to the supreme court of appeals, same to be taken and perfected within six months from the date of such final finding, order, or judgment, and the supreme court of appeals may, on petition of the attorney-general, or any other party so aggrieved, if said petition be presented within six months from the date of the final finding, order, or judgment of the Commission, award a writ of supersedeas to any such final finding, order, or judgment, and may review, affirm, reverse, or modify the same, as justice may require, and enter therein such order as may be right and just."—Sections 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33 and 34 of Act of April 15, 1903, above cited. R. 98-103.

Attention is also called here again to the Rules of Practice and Procedure adopted by the Commission in the discharge of the duties and in the exercise of the powers devolved upon it by law, which still farther emphasize and illustrate its character as a court.

It is thus organized and equipped as a court, is given all of the essential attributes and powers of a court, and is made a court of justice and of record, not only in form and in substance, but in name.

Though of limited jurisdiction, it is a tribunal of very great importance, and of dignity only inferior to the Supreme Court of Appeals of the Commonwealth.

It would be an idle and a useless thing to waste time and effort to attempt by farther demonstration to show that the tribunal thus endowed and constituted is *quoad* the order and proceedings which have been stayed by the injunctions here complained of, in the highest sense a court of record and a court of justice, if these quotations from the law of its creation do not carry conviction that such is its character.

Such is the court, the proceedings of which these complainants, in contravention of that judicial comity which is observed by the tribunals of all enlightened nations, and in violation as

we respectfully conceive of the mandate of Section 720 of the United States Statutes, invoked the jurisdiction of the Circuit Court of the United States for the Eastern District of Virginia to stay by its injunction.

Applying the very appropriate language of the United States Supreme Court in *United States* vs. *Parkhurst-Davis Mercantile Company*, 176 U. S., 317, and in *Haines* vs. *Carpenter*, 91 U. S., 254-257, *supra*, "*the great object of*" *these suits* "*is to enjoin and stop litigation in the State courts*, and to bring all the litigated questions *before the*" *United States* "*Circuit Court*. THIS IS ONE OF THE THINGS THE FEDERAL COURTS ARE EXPRESSLY PROHIBITED FROM DOING."

IV.

There is another ground presented in the answer of these defendants to the Rule to show cause, upon which we rely, but which, if the positions hereinbefore discussed are sustained, it will be unnecessary for the court to consider. It is, that these are really suits against a State. Not suits to restrain a State official from executing an invalid statute to the prejudice of the property or personal rights of plaintiffs who will be irretrievably injured in respect to their property or persons by the execution of such wrongful and invalid law; but they are, however this truth may be disguised, suits to restrain and prevent a distinct, valid and constitutional department of the State government from exercising the governmental functions, duties, and powers rightfully devolved upon it by the Constitution and laws of Virginia.

As has been already shown, this tribunal is a distinct substantive department of the State government, as much so as is the Executive, the General Assembly, or the Supreme Court of Appeals of the State.

The Virginia tribunal, in its origin and constitution, differs essentially from the railroad commissions passed upon in the Railroad Commission Cases, 116 U. S., 307, and from the Minnesota Railroad Commission considered in *C. M. & St. P. R. R. Co.* vs. *Minnesota*, 134 U. S., 418, and from the Texas Railroad Commission discussed in *Reagan* vs. *Farmers' Loan and Trust Co.*, 154 U. S., 362, 388-413.

At the hazard of some iteration, I beg to say that:

1. The Virginia tribunal is made by the organic law of the State a distinct substantive department of the State government.

The Railroad Commissions considered in the cases just cited were all of legislative creation.

2. The Virginia Commission, in the proceedings, acts and orders challenged in these suits, as it was required by the law of its creation to do, proceeded and acted judicially, and as a court, according due process of law and all appropriate judicial process to the parties plaintiff and defendant.

The commissions, in the cases referred to, were held to be administrative bodies, and did not proceed or act judicially, certainly not to the extent, or in the sense in which the Virginia tribunal was required to sit and proceed and act as a court, and did so sit and proceed and act.

3. In the Article of her Constitution and in her statutes creating the Virginia Commission, and defining its powers and duties, the Commonwealth has not given her consent to any collateral attack by suits in any courts whatever upon the judgments and orders of the Commission, but has prohibited any such suits, and as was provided in the Acts of Parliament creating the British Commission, has enacted that the acts, judgments and orders of the Commission shall be brought in question and reviewed only upon appeal allowed of right, to the

Supreme Court of Appeals of the State, from any decision of the Commission by which any party deems himself or itself to be aggrieved.

And any party so appealing, deeming itself or himself aggrieved by any decision of the Court of Appeals of the State, may carry the case to the Supreme Court of the United States, and obtain redress there.

The Act of Texas creating the Commission of that State, reviewed in *Reagan* vs. *The Farmers' Loan and Trust Company,* gave the consent of Texas to collateral attack upon any act or order of that Commission by suit "in a court of competent jurisdiction in Travis County," and the United States Supreme Court held in the Reagan Case, 154 U. S., 392, that this act gave the United States Circuit Court for the Western District of Texas jurisdiction of such a suit, for the reason that said United States court was as to the parties to the suit "a court of competent jurisdiction in Travis county."

Upon the principles approved in *Ex parte* Ayers, 123 U. S., 443, *Louisiana* vs. *Jumel,* 107 U. S., 711; *Antoni* vs. *Greenhow,* 107 U. S., 769; *Cunningham* vs. *Macon & B. R. R. Co.,* 109 U. S., 446; *Haygood* vs. *Southern,* 117 U. S., 52; *Fitts* vs. *McGhee,* 172 U. S., 516; *Smith* vs. *Reeves,* 178 U. S., 440; *Minnesota* vs. *Hitchock,* 185 U. S., 386, these suits are really suits against the State.

Exparte Young and *Hunter* vs. *Wood.*

This case, as we have endeavored to present it here for Virginia who was, under the statute, R. 98, the party complainant in the judgment and order of the Corporation Commission which was enjoined by the decrees complained of, and who is the real party defendant here, is not at all weakened by the recent decision of this court in *Ex parte* Young, decided March

23rd last, 209 U. S., 123, and in *Hunter* vs. *Wood,* 209 U. S., 205, in which the decision in the Young case is followed and adopted.

On the contrary, the reasoning and the rulings of the court in the Young case, radically differentiate this case from that, and confirm the salutary, and indeed the necessary doctrine upon which the case for Virginia rests.

This will be apparent from a brief running comparison of the two cases.

(a) The action begun and threatened by the authorities of Minnesota and enjoined by the United States Circuit Court in the Young Case, were, as this court held, taken or attempted to be taken under palpably and flagrantly unconstitutional laws. As to this, in addition to other similar criticisms of those laws, this court said:

> "We hold therefore that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws, themselves *are unconstitutional on their face, without regard to the question of the insufficiency of those rates.*"

Among other severe punishments imposed by the Minnesota Acts, it was made a felony punishable by a fine up to $5,000.00 and imprisonment in the State prison up to five years for an agent of a railroad company to sell a passenger a ticket at a rate in excess of two cents a mile.

The Virginia enactments, both organic and statutory, under which her Corporation Commission acts, are, as we have seen, *on their face,* and in their intent, meaning, effect, and operation, unquestionably CONSTITUTIONAL.

The punishment which could be imposed under them is lim-

ited by the Virginia statute to $500.00 *as a maximum* for the failure or refusal of such corporation, after reasonable notice of not less than ten days, by service thereof, to obey such order or requirement. And each day's continuance of such failure or refusal is made a separate offence, R. 99; but such penalty could be imposed only after a judicial hearing and trial: And from any judgment of the Commission imposing it there is an appeal of right. See Section 26 of Act of April 15, 1903. Transcript and R. 99.

There is no punishment of any agent or officer, nor is there any imprisonment denounced against any one under the Virginia laws.

(b) In the Minnesota case no prior hearing was ever given to the railroad company, and no opportunity whatever to show that the rate fixed by the legislative act was confiscatory or otherwise unreasonable or unjust.

In the Virginia case, there was a judicial hearing before an impartial tribunal, extending through months, in which every opportunity was given these appellee companies to be heard, to make every defense, and to show every cause, which could be made or shown in any other court, against the making of the proposed rate. Upon these hearings each company did actually introduce all of the evidence which it desired to submit, and was in fact fully heard and accorded as full and fair a trial as could have been given by any other court.

(c) But the most important difference between the two cases is the circumstance:

That while the injunction in the Minnesota case was against certain executive and administrative officers of that State, the injunctions complained of in these cases, were intended to stay, and did stay, the proceedings of a court of the State of Virginia.

The rulings of this court upon this point in the Young case were explicit and emphatic, and clearly take these Virginia cases out of the decision in the Minnesota case.

In the Young case this court said:

> "But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a State court. *Taylor* vs. *Taintor*, 16 Wall. 366-370, 21 L. Ed. 287-290; *Harkrader* vs. *Wadley*, 172 U. S. 148, 43 L. Ed. 399, 19 Sup. Ct. Rep. 119."

And again:

> "It is proper to add that the right to enjoin an individual, even though a State official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury." * * *

> "The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former."

In *Harkrader* vs. *Wadley*, 172 U. S., 148, 169, the United States Supreme Court said:

> "No case can be found where an injunction against a State officer has been upheld, where it was conceded that such officer was proceeding under a valid State statute."

We take it that the doctrine would be the same, if, as here the State officers were proceeding under *valid* State statutes, whether their validity was conceded or not.

If it would subject the appellees in these suits to any hardship, or work any injustice upon them, to apply to them the

just and reasonable rule for which we here contend, there would be greater reason than any they have shown for this court to stay the proceedings pending in the State Commission, and to review the decision already rendered by that tribunal. But, as has been already pointed out, no hardship would result to these appellees if they are remanded to the just and reasonable, and ample remedy given them by the laws of Virginia for the redress of any possible wrong which may have been done them by the order of the Commission, while a great hardship would be imposed upon, and, as we believe, a serious wrong would be done to the Commonwealth, if she shall be required to again, at great expense of money and labor and of time, to litigate the very questions which have already been litigated through months in the State tribunal; or, if, after having had not only their day, but months in this State court, and having conducted the litigation to a conclusion and made their defense there, the complainants were permitted either to "mend their hold," by introducing additional testimony, or to make up a new case in the United States Circuit Court or in any other court involving the very same issues, which have been fully and fairly heard and considered and adjudicated in the State tribunal.

How could any possible wrong or injustice be done to these appellees by leaving them to the adequate remedy by appeal given them by the Constitution and laws of Virginia, when there is not a question raised by their bills as to the legality or rightfulness of the judgment and order of the State Corporation Commission complained of, which they could not raise, and avail of, and not a grievance of which they complain here which could not and would not, if their complaints are well founded, be redressed, as effectively, and more speedily and with less cost and inconvenience to both parties by the remedy by appeal prescribed by the Constitution and statutes of Virginia, than

if this litigation has all to be again fought over to a finality in the Circuit Court, with not improbable appeals in any event, if either party considers itself aggrieved by the decision of that court, to the United States Circuit Court of Appeals, and if either party shall consider itself aggrieved by the decision of that court, then a farther appeal to the United States Supreme Court.

It cannot be gainsaid that the regular and orderly mode of redress provided for by the Constitution and laws of Virginia and of the United States gave and still gives the appellees an ample and sufficient remedy, which it will do them no wrong to require them to pursue; and that the mode of redress which they seek to have this court to sanction would operate a great hardship, and as we most respectfully, but most earnestly submit, a great wrong and injustice also to the Commonwealth of Virginia—the party plaintiff in the case sought here to be reviewed, and as we consider a necessary party to any suit in which the decision of the State tribunal in that case can be properly reviewed.

These cases furnish a pointed illustration of the wisdom of the principle embodied in Section 720 of the laws of the United States, and of the unwisdom and the injustice of permitting a violation of the time-honored, necessary, and wholesome rule, that a collateral attack upon a judgment of a lawful tribunal, acting within its jurisdiction, should never be allowed or tolerated by any court of justice.

If there is a reasonable doubt as to the validity of the State laws or as to the jurisdiction of the Federal courts to attack these acts of a State tribunal, such doubt must be solved in favor of the State.

While there is, as we are convinced, upon principle as well

as upon conclusive authority, no doubt as to the correctness of the propositions hereinbefore presented on behalf of the appellants, we deem it right in a case of such vital importance, to invoke also the just rule of reasonable doubt, as the same has been established by this court.

(1) If there is a reasonable doubt as to the constitutional validity of the organic and statutory enactments of Virginia which are attempted to be impeached by the appellees, that doubt must be solved in favor of the validity of those laws.

> *"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."*
>
> Sinking Fund Cases, 99 U. S. 718;
> Approved and reaffirmed in
> *Powell* vs. *Pennsylvania,* 127 U. S. 184, and in
> *Sweet* vs. *Rechel,* 159 U. S. 393.

(2) If there is any reasonable doubt as to whether the United States Circuit Court had jurisdiction of these cases, it was error for the court to take jurisdiction of them.

> "The presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears."
>
> 1 Desty Fed. Procedure, p. 340;
> *Grace* vs. *American Central Insurance Company,* 109 U. S. 278-284;
> *Pepper* vs. *Fordyce,* 119 U. S. 469;
> *Turner* vs. *Bank,* 4 Dall. 8.

The far-reaching importance of the issues involved in this case, justify their fullest discussion.

I ask leave, therefore, to submit the following concise restatement of the argument, for the appellants, and for Virginia whom they represent:

SUMMARY OF THE ARGUMENT FOR VIRGINIA.

I.

The regulation and control of railway and other transportation companies, particularly as to their rates and charges for transportation wholly within the territorial limits of the State, is an essential attribute of the government of a State, a legitimate and necessary part of the police power, to be exercised by such tribunal or body as the State may select and clothe with the necessary powers for the purpose.

II.

The experience of Virginia and the other States of the American Union through more than half a century of governmental dealings with such companies had demonstrated that these powers and duties of regulation could not be efficiently, or satisfactorily exercised by an ordinary legislature, or by a body invested merely with executive or administrative powers, not proceeding judicially, nor according to the parties in interest due process of law, and the equal protection of the laws, in accordance with the guarantees of the 14th Amendment to the Federal Constitution.

III.

It had been also in like manner demonstrated that the ordinary courts of the country could not afford adequate relief for a situation so difficult and complex. Such a court might determine that a particular rate or schedule of rates was unjust, unreasonable and illegal, because confiscatory; but it could not prescribe the rate or schedule which should be adopted. Any redress such courts could give was and is purely negative in its character, and absolutely inadequate to meet the require-

ments of conditions which demand constant supervision and prompt and positive relief.

IV.

The Virginia State Corporation Commission was accordingly created under the express provisions of the Virginia Constitution, and endowed by it and by the statutes of the Commonwealth passed in conformity with its provisions, with the powers with which it was necessary to clothe the tribunal which should be established for this purpose.

It was constituted therefore by the organic and statute law, in the first place, as a judicial tribunal, distinctly and expressly a court in respect to its more important functions, equipped with all the machinery and invested with all of the powers of a court within the domain of its broad but special jurisdiction.

In ascertaining and deciding what rates it was just and reasonable for these public service companies to charge for transportation of passengers and goods within the State, the Commission is required to act judicially, to investigate judicially, and after ample notice to all parties in interest, to accord to these transportation companies all appropriate judicial process, and all due process of law, every opportunity to be heard, and a full and fair trial by trained, competent, impartial, and upright judges specially selected for just such exercise of these important and difficult duties and powers.

It is in fact and in law a court.

As a further protection against possible injustice, an appeal of right to the Supreme Court of Appeals of the State is given to any party deeming himself aggrieved by ANY order or judgment of the Commission, and if denied by that appellate court any right assured by the Constitution and laws of the United

States, redress may be had by invoking the paramount jurisdiction of the United States Supreme Court.

V.

While the most important powers and duties devolved upon this tribunal in the matter of determining the rates to be charged by transportation companies, are judicial, it is also endowed with extra judicial powers, essential to the just and effective regulation of such companies—powers which are technically defined as "legislative," namely, the power of tentatively proposing, and after having judicially investigated, considered and ascertained the rates which are just and reasonable, of formally prescribing the rates so judicially ascertained to be reasonable and just.

VI.

This Commission was so constituted not to *evade,* but to *do,* justice; not to oust the jurisdiction of any court which could afford adequate relief, but to give to the transportation companies and to the Commonwealth a tribunal appropriately clothed with complex powers to deal justly and effectively with complex problems, and a complex subject.

VII.

It is a Valid Tribunal.

(a) It is sanctioned by the State Constitution, for it is the creature of that instrument.

(b) It is not in its framework, essence, or substance repugnant to the Federal Constitution, for it not only does not deny to litigants or parties whose interests are affected by its action, due process of law, or the equal protection of the laws, but it is

required by the very charter of its existence to accord "due process of law," and as full and fair a hearing and trial as it would be possible for any court to give. Nor does, nor can it, without committing reversible error, deprive any one of the equal protection of the laws.

Nor does the Federal Constitution contain any inhibition against the blending by the States of the powers of two, or of all three of the great departments of government in the hands of one officer or one official body.

VIII.

These Suits are in Contravention of Section 720, United States Revised Statutes.

The Commission being thus to all intents and purposes a validly constituted court, the grant of an injunction as prayed for by appellees, is in direct violation of Section 720 of the Revised Statutes of the United States which expressly forbids any court of the United States from granting a writ of injunction to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy—and this is in no sense a proceeding in bankruptcy.

IX.

The Doctrine of Res Adjudicata.

Whether the Virginia State Corporation Commission be regarded as a court, or as a legislative body, or whatever its distinctive characteristics as related to the great departments of government, it is unquestionably a tribunal fully and validly empowered by the Constitution and laws of Virginia, and under the Constitution and laws of the United States, to hear, try,

and finally determine the very case which it did hear and try during the twelve months prior to April 27, 1907, and did adjudicate and decide by its final findings, order, and judgment rendered and pronounced upon that day, which findings, order, and judgment were and are conclusive upon the appellees here, the defendants in that proceeding, and upon the world; and under the Constitution and laws of the United States and of Virginia, can be reviewed or reversed only upon appeal taken in the manner provided by the Constitution and laws of Virginia and of the United States.

All matters and questions presented by the bills in these causes, or involved in these suits here, upon the merits, were presented or involved in the case known as The Virginia Passenger Rate case so decided by said Commission on the 27th of April, 1907.

And the defendants rely upon said findings, order, and judgment of the State Corporation Commission of said last mentioned date, as a bar to these suits instituted in the Circuit Court of the United States for the Eastern District of Virginia.

X.

As a judgment of a justice of the peace, or the acts or findings of a town council, or of any tribunal whatsoever, and however humble, or however important, done in the exercise of a lawfully conferred discretion, and within the scope of their validly conferred authority, can never be either directly or collaterally attacked for errors of judgment, of law, or of fact, by any court, State or Federal, however exalted, except in such manner as may be prescribed by law, so the acts and findings of the Virginia State Corporation Commission, done within the limits of its lawful authority and jurisdiction, cannot be attacked or impeached except upon appeal to the Supreme Court

of Virginia, or to the Supreme Court of the United States in the manner provided by law.

XI.

These suits, in their last analysis, are suits against the State, and therefore should not be maintained.

The appellants, the members of said Commission, have no personal or individual connection with the subject matter of these suits, no personal interest whatever in the suits or in the proceedings and order and judgment which it is the object of these suits to impeach, any more than the judges of the Supreme Court of a State, or of the United States, or the members of a State legislature have any personal connection with or interest in any of the judgments of those courts, or acts of such legislature, or may be sued therefor.

They constitute the official personnel of the State Corporation Commission, an integral co-ordinate department of the State government, and only as such are impleaded here, so that these suits are in fact against a department of the State government, and as such are suits against the State.

XII.

For the said Circuit Court to entertain these suits operated as a great injustice to the State of Virginia. It was a hardship and a grievous wrong to her for any Court, after these very matters alleged in their bills have already been exhaustively litigated through many months to a finish before the State tribunal and after a fair trial brought to a final decision there, shall at the instance of the appellees here, after and because an adverse decision has been rendered against them by the State tribunal, require these matters to be again, at great inconvenience and enormous cost to Virginia, litigated, and not only

this, but permit the appellees to "mend their hold," and to make up a new case.

On the other hand, no hardship or injustice whatever will be done to the appellees by remanding them to their ample remedy by appeal from the judgment of the Commission to the Supreme Court of the State and thence, if they find occasion for it, to the Supreme Court of the United States.*

For the foregoing consideration and others which they will suggest, it is manifest that the sections of the Virginia Constitution and the statutes from which the Commission derives its existence and its powers, violate no provisions of the Federal Constitution, are in conflict with no principle essential to the preservation of liberty, but are competent, valid, and constitutional enactments; and that the judgments and orders of the tribunal thus constituted, cannot be collaterally attacked in the United States Circuit Court or in any other court, and can

* The contention that there would be any very serious difficulty in complying with the provisions of sub-section (*c*) of Section 156 of the Virginia Constitution, which has been suggested and attempted to be supported by affidavits, is wholly unfounded.

If there should be difficulty in some cases in the depot agent getting the names and addresses of passengers, there would be none whatever about the conductors doing this when they take up the tickets. Or the information could be readily secured by the reasonable requirement by the railway companies that passengers should endorse their names and addresses upon their tickets.

As the information is called for solely for their benefit, nobody could complain if any passengers should fail to comply with such a reasonable regulation.

It is also to be remembered that the requirement in question does not operate when an appeal is granted without a supersedeas.

only be reviewed, brought in question, and if erroneous, be reversed and set aside, by the Court of Appeals of the State, or by the Supreme Court of the United States in the regularly and orderly mode of procedure by appeal prescribed by the Constitution and laws of the State, and of the United States.

WILLIAM A. ANDERSON.

September 30th, 1908.

APPENDIX.

TO BRIEF OF WILLIAM A. ANDERSON FOR THE APPELLANTS IN THE VIRGINIA CORPORATION COMMISSION CASES.

I.

Extracts from Article XII of the Constitution of Virginia Establishing the State Corporation Commission.

(Sections 155 and 156, Virginia Constitution.)

Sec. 155. A permanent commission, to consist of three members, is hereby created, which shall be known as the State Corporation Commission. The commissioners shall be appointed by the Governor, subject to confirmation by the General Assembly in joint session, and their regular terms of office shall be six years, respectively, except those first appointed under this Constitution, of whom, one shall be appointed to hold office until the first day of February, nineteen hundred and four, one, until the first day of February, nineteen hundred and six, and one, until the first day of February, nineteen hundred and eight. Whenever a vacancy in the Commission shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term, subject to confirmation by the General Assembly, as aforesaid. Commissioners appointed for regular terms shall, at the beginning of the terms for which appointed, and those appointed to fill vacancies shall, immediately upon their appointments, enter upon the duties of their office; but no person so appointed, either for a regular term, or to fill

a vacancy, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment, or adjourned *sine die* without confirming the same, nor shall he be eligible for re-appointment to fill the vacancy caused by such refusal or failure to confirm. No person while employed by or holding any office in relation to, any transportation or transmission company, or while in any wise financially interested therein, or while engaged in practicing law, shall hold office as a member of said Commission, or perform any of the duties thereof. At least one of the commissioners shall have the qualifications prescribed for judges of the Supreme Court of appeals; and any commissioner may be impeached or removed in the manner provided for the impeachment or removal of a judge of said court.

The Commission shall annually elect one of their members chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed, and subject to removal, by the Commission. It shall prescribe its own rules of order and procedure, except so far as the same are specified in this Constitution or any amendment thereof. The General Assembly may establish within the department, and subject to the supervision and control, of the Commission, subordinate divisions, or bureaus, of insurance, banking or other special branches of the business of that department. All sessions of the Commission shall be public, and a permanent record shall be kept of all its judgments, rules, orders, findings and decisions, and of all reports made to, or by, it. Two of the commissioners shall constitute a quorum for the transaction of business, whether there be a vacancy in the Commission or not. The Commission shall keep its office open for business on every day except Sundays and legal holidays. Transportation companies

shall at all times transport, free of charge, within this State, the members of said Commission and its officers, or any of them, when engaged on their official duties. The General Assembly shall provide suitable quarters for the Commission and funds for its lawful expenses, including pay for witnesses summoned, and cost of executing processes issued, by the Commission of its own motion; and shall fix the salaries of the members, clerks, assistants and subordinates of the Commission and provide for the payment thereof; but the salary of each commissioner shall not be less than four thousand dollars per annum. After the first day of January, nineteen hundred and eight, the General Assembly may provide for the election of the members of the Commission by the qualified voters of the State; in which event, vacancies thereafter occurring shall be filled as hereinbefore provided, until the expiration of twenty days after the next general election, held not less than sixty days after the vacancy occurs, at which election the vacancy shall be filled for the residue of the unexpired term.

Sec. 156. (*a*) Subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters and amendments or extension thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State. The Commission shall prescribe the forms of all reports which may be required of such corporations by the Constitution or by law; it shall collect, receive, and preserve such reports, and annually tabulate and publish them in sta-

tistical form; it shall have all the rights and powers of, and perform all the duties devolving upon, the Railroad Commissioner and the Board of Public Works, at the time this Constitution goes into effect, except so far as they are inconsistent with this Constitution, or may be hereafter abolished or changed by law.

(*b*) The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules regulations and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void. The Commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable dis-

criminations by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses: and before the Commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the Commission shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the Commission. The authority of the Commission (subject to review on appeal

as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws: provided, however, that nothing in this section shall impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons.

(*c*) In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against

the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the Commission, within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed, or authorized, by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offence: provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liabilities to fines or penalties.

(*d*) From any action of the Commission prescribing rates, charges *of* classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation

or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in subsection (*e*) of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provision as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges or classifications of traffic, schedule, facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action or (if allowed by law) by the Commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts, except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the Commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws, provide for appeals from any other action of the Commission, by the Commonwealth or by any person interested, irrespective of the amount involved. All appeals from the Commission shall be to the Supreme Court of Appeals only; and in all appeals to which the Commonwealth is a party, it shall be represented by the Attorney-General or his legally appointed representative. No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the Commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the

Commission in the performance of its official duties; provided, however, that the writs of *mandamus* and prohibition shall lie from the Supreme Court of Appeals to the Commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer.

(*e*) Upon the granting of an appeal, a writ of *supersedeas* may be awarded by the appellate court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the appellate court, no action of the Commission prescribing or affecting rates, charges, or classifications of traffic of any transportation or transmission company shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceedings resulting from such appeal, until a suspending bond shall first have been executed and filed with, and approved by the Commission (or approved on review by the Supreme Court of Appeals), payable to the Commonwealth, and sufficient in amount and security to insure the prompt refunding, by the appealing corporation to the parties entitled thereto, of all charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the court on appeal. The Commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any *supersedeas*), of the order or requirement appealed from, to keep such accounts, and to make to the Commission, from time to time, such reports, verified by oath, as may, in the judgment of the Commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the Commission appealed from, together with the names and addresses of the persons to whom such overcharges

will be refundable in case the charges made by the company pending the appeal be not sustained on such appeal; and the Commission shall also, from time to time, require such company, under like penalty, to give additional security on, or to increase, the said suspending bond, whenever in the opinion of the Commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid. Upon the final decision of such appeal, all amounts which the appealing company may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the company to the parties entitled thereto, in such manner, and through such methods of distribution, as may be prescribed by the Commission, or by law. All such appeals affecting rates, charges or classifications of traffic, shall have precedence upon the docket of the appellate court, and shall be heard and disposed of promptly by the court, irrespective of its place of session, next after the *habeas corpus,* and Commonwealth's, cases already on the docket of the court.

(*f*) In no case of appeal from the Commission shall any new or additional evidence be introduced in the appellate court; but the chairman of the Commission, under the seal of the Commission, shall certify to the appellate court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the Commission as may be selected, specified and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the Commission may deem proper to certify. The Commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and

considered by the appellate court, upon disposing of the appeal. The appellate court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from as well as any other matter arising under such appeal: provided, however, that the action of the Commission appealed from shall be regarded as *prima facie* just, reasonable and correct; but the court may, when it deems necessary, in the interest of justice, remand to the Commission any case pending on appeal, and require the same to be further investigated by the Commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest), before the appeal is finally decided.

(*g*) Whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such order as, in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it has been entered by the Commission at the time the original order appealed from was entered. The right of the Commission to prescribe and enforce rates, charges, classifications, rules and regulations, affecting any or all actions of the Commission theretofore entered by it and appealed from, but based upon circumstances or conditions different from those existing at the time the order appealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the Commission, prescribing or altering such rates, charges, classifications, rules or regulations, shall be retroactive.

(*h*) The right of any person to institute and prosecute in

the ordinary courts of justice, any action, suit or motion against any transportation or transmission company, for a claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the Commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the Commission; but, in no such proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the Commission, within the scope of its authority, and then in force, be questioned: provided, however, that no case based upon or involving any order of the Commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof.

(*i*) The Commission shall make annual reports to the Governor of its proceedings, in which reports it shall recommend, from time to time, such new or additional legislation in reference to its powers or duties, or to the creation, supervision, regulation or control of corporations, or to the subject of taxation, as it may deem wise or expedient, or as may be required by law.

(*k*) Upon the organization of the State Corporation Commission, the Board of Public Works and the office of Railroad Commissioner, shall cease to exist; and all books, papers and documents pertaining thereto, shall be transferred to, and become a part of the records of, the office of the State Corporation Commission.

(*l*) After the first day of January, nineteen hundred and

five, in addition to the modes of amendment provided for in Article Fifteen of this Constitution, the General Assembly, upon the recommendation of the State Corporation Commission, may, by law, from time to time, amend subsections *a* to *i*, inclusive, of this section, or any of them, or any such amendment thereof; provided, that no amendment made under authority of this sub-section shall contravene the provisions of any part of this Constitution other than the sub-sections last above referred to or any such amendment thereof.

II.

An Act

To put into effective operation the provisions of the Constitution relating to the creation, appointment and organization of the "State Corporation Commission," its jurisdiction, powers, functions, and duties; the qualifications of the members and officers thereof, their appointment and salaries; the location of its offices, and places and times of its public sessions; its writs, processes, orders, findings and judgments; appeals from its orders, findings and judgments, and its expenses, etc.

Approved April 15, 1903.

Be it enacted by the General Assembly of Virginia as follows:

1. That as used in this act the term "corporation" or "company" shall include all corporations chartered by the acts of the General Assembly of Virginia, or under the general incorporation laws of this State, or doing business therein, and all trusts, associations, and joint-stock companies, having any powers or privileges not possessed by individuals or unlimited partnerships, and shall exclude all municipal corporations and public institutions owned or controlled by the State; the term "charter" shall be construed to mean a charter of incorporation by or under which any such corporation is formed; the term "transportation company" shall include any company, trustee, or other person owning, leasing, or operating for hire, a railroad, street railway, canal, steamboat, or steamship lines, also any freight-car company, car association or car trust, express company, or company, trustee, or person in any way engaged

in business as a common carrier over a route acquired, in whole or in part, under the right of eminent domain; the term "transmission company" shall include any company owning, leasing, or operating for hire, any telegraph or telephone line; the term "public service corporation" shall include all transportation and transmission companies, all gas, electric light, heat, and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public; the term "person" as used in this act shall include individuals, partnerships, and corporations, in the singular as well as in the plural number; the term "the Commission" shall be construed to mean the "State Corporation Commission," and the word "officers," when used in connection with said Commission, shall be construed to mean any clerk, bailiff, assistant, or other appointee of the State Corporation Commission.

APPOINTMENT OF MEMBERS OF CORPORATION COMMISSION; TERMS; COMMISSION.

2. That the Governor shall, at least fifteen days before the first day of February, nineteen hundred and four, and at least fifteen days before the first day of February in each alternate year thereafter, appoint, subject to the confirmation of the General Assembly, in joint session, a citizen of this State, possessing the qualifications prescribed by the Constitution and by law to be a member of the "State Corporation Commission" (which shall be composed of three members), and whose term of office shall be that prescribed by the Constitution, and shall begin on the first day of February next succeeding his appointment and confirmation, except in the case of an appointee to fill a vacancy, or where the General Assembly fails to confirm

an appointee to a full term of office before the date fixed by law for the commencement of his said term of office; in either case the term of office of any such appointee shall begin from the date of his qualification, and shall be for the unexpired portion of the term of office to which he shall be so appointed and confirmed. The member of the Commission first appointed and confirmed, and those hereafter appointed and confirmed, shall hold office for the respective terms for which they have been, or may hereafter be, appointed, and until their respective successors in office have been appointed, confirmed, and qualified, unless they shall sooner be removed from office as prescribed by the Constitution or by law. The Governor shall commission each of the members of the Commission, and said Commission shall be filed by the members in the office of the clerk of the Commission.

WHO ELIGIBLE TO SERVE AS A MEMBER OF THE COMMISSION; QUALIFICATIONS, ETC.

3. That no person shall be eligible to serve as a member of the State Corporation Commission who, on the date of the commencement of his term of office, shall be employed by or hold any office in relation to any transportation or transmission company, or is in any way financially interested therein, or is engaged in the practice of law; nor shall any person be eligible to appointment as a member of the Commission unless at the time of his appointment he is a qualified voter under the Constitution and laws of this State. One of the commissioners shall have the qualifications prescribed for judges of the Supreme Court of Appeals.

OATH OF OFFICE.

4. That the members of the Commission and officers thereof, for whose appointment provision is made either by the Con-

stitution or by law, before entering upon the discharge of the duties of their respective offices, shall, in addition to the oath prescribed by section thirty-four of the Constitution, severally take and subscribe the following oath, to-wit:

"I, —— ——, do solemnly swear (or affirm) that at the present time I am not employed by, and do not hold any office in relation to, any transportation or transmission company, and have not in any wise any financial interest in any such company, and am not engaged in the practice of law, and that during the term of my office as — I will not, either directly or indirectly, be employed by or hold any office in relation to any transportation or transmission company, or in any wise be financially interested in any such company, or be engaged in the practice of law, so help me God."

But the said additional oath shall be taken and subscribed by the first members of the commission and by the officers thereof as soon as practicable after the passage of this act.

The oaths prescribed by the Constitution and this act may be taken and subscribed before any officer authorized by the laws of this State to administer oaths, and shall be certified by such officer and recorded on the minutes of the proceedings of the Commission, and then returned by its clerk as required by law as to the oaths of other State officers.

Offices of Commission to be Located in the City of Richmond; Where Notice, Writ or Process to be Returnable; When Public Sessions may be Held Elsewhere.

5. That the offices of the Commission shall be located, and its public sessions, held, in the city of Richmond, and all notices, writs, and processes issued by the Commission shall be made returnable to, and command the corporation or person

against whom directed to appear before the Commission and answer on a certain day to be named therein; provided, however, the Commission may in its discretion, if public necessity or the convenience of the parties require, hold public sessions elsewhere in the State, and may order any notice, writ, or process to be made returnable to the place of such session; and for the holding of any such session the Commission may occupy the court-room of the court-house of the city or county wherein such session may be held if said court-room shall not at the time be in use for the sessions of the court of any such city or county.

OFFICES.

6. That the rooms in the State library building now occupied as offices by the railroad commissioner shall be the offices of the Commission, its clerk, bailiff, assistants, and subordinates until otherwise provided by law, and the register of the land office is hereby directed to have the said rooms fitted up in a suitable manner for the use and occupation of the Commission and its officers. And the sum of five hundred dollars, or so much thereof as may be necessary, is hereby appropriated for that purpose out of any moneys in the treasury not otherwise appropriated.

CLERK, ASSISTANT CLERK, BAILIFF, STENOGRAPHER, &C., QUALIFICATIONS AND TERMS.

7. That the Commission shall have a clerk, a first assistant clerk and a bailiff, and a stenographer (who shall also be a typewriter), each of whom shall have the qualifications for office, be clothed with the power, discharge the functions and perform all the duties hereinafter prescribed, and such other duties as may be prescribed or required by the Commission, and all of whom shall be appointed by the Commission, and whose

respective terms of office shall be as prescribed by the Commission, and they shall be subject to removal by the Commission as hereinafter in this act provided. The officers so appointed shall hold office until their successors have been appointed, qualified, and given bond as required by law, unless they shall sooner be removed from office, as hereinafter provided.

OFFICERS TO BE RESIDENTS OF THE STATE AND QUALIFIED VOTERS.

8. That the officers of the Commission shall at the time of their appointment be actual residents of this State, and qualified voters therein, under the Constitution and laws thereof.

THE FIRST MEMBERS OF THE COMMISSION TO MEET, ORGANIZE, APPOINT CLERICAL FORCE, &C.; WHEN THE COMMISSION TO BE VESTED WITH POWERS AND FUNCTION OF OFFICE.

9. That the persons appointed, confirmed, and commissioned to be the first members of the Commission under the provisions of section one hundred and fifty-five of the Constitution shall, as soon as practicable, meet in the office now used by the railroad commissioner and organize by taking and subscribing the oaths of office prescribed by the Constitution and by this act, and elect one of their number as chairman of the Commission, appoint a clerk, a first assistant clerk, a bailiff, and a stenographer; and when organized the Commission shall have all the powers, discharge all the functions, and perform all the duties prescribed by the Constitution and by law.

WHEN THE OFFICE TO BECOME VACANT; HOW VACANCIES FILLED.

10. That if any person heretofore or hereafter appointed and confirmed to be a member of the Commission, or if any person appointed an officer of the Commission, shall fail to

qualify as required by the Constitution or by law, or to give any bond required by law of any such officer within thirty days after the date fixed by the Constitution or by law, as the commencement of the term of office to which he shall be appointed, then such office shall, because of such failure to qualify, or to give any required bond within the time aforesaid, become vacant, and such vacancy shall, in the case of members of the Commission, be filled as prescribed by section one hundred and fifty-five of the Constitution, and in the case of officers and appointees of the Commission, be filled by appointment of the Commission.

DUTIES OF CLERK; RECORDS; CERTIFIED COPIES SAME LEGAL EFFECT.

11. That the clerk of the Commission shall keep a minute book in which shall be recorded all the proceedings, orders, findings, and judgments of the public sessions of the Commission, and the minutes of the proceedings of each day's public session shall be read and approved by the Commission and signed by its chairman, or acting chairman; he shall, subject to the supervision and control of the Commission, have custody of and preserve all of the records, documents, papers, and files of the Commission, or which may be filed before it in any complaint, proceeding, contest or controversy, and said records, documents, papers, and files shall be open to public examination in the office of said clerk to the same extent as the records and files of the courts of this Commonwealth; he shall when requested, make and certify copies from any record, document, paper, or file in his office, and if required, affix the seal of the Commission thereto, and except when made at the instance of the Commission or on behalf of the Commonwealth, he shall charge and collect the same fees as are fixed by law for like services ren-

dered by the clerks of the courts of this Commonwealth, and any such copy, so certified, shall have the same faith, credit, and legal effect as copies made and certified by the clerks of the courts of this Commonwealth from the records and files thereof; he shall certify all allowances made by the Commission to be paid out of the public treasury for witness fees, service of process, or other expenses; issue all notices, writs, processes or orders awarded by the Commission; or authorized by law, or by the rules of the Commission; he shall receive all fines and penalties imposed by the Commission, all moneys collected on judgments, all registration fees required by law to be paid by corporations, all fees collected by any officer of the Commission, and the tax on the seal of the Commission, and shall keep an accurate account of the same and what disposition has been made thereof, together with all fees collected by him for services rendered, either by him or his assistants, and shall, at least once in every thirty days during his term of office, render a statement of all such receipts and collections to the auditor of public accounts, and pay the same into the treasury of the Commonwealth, and shall keep all such other accounts of such collections and disbursements, and shall make all such other reports thereof as may be required by law or by the regulations prescribed by the auditor of public accounts; and generally shall have the powers, discharge the functions, and perform the duties of a clerk of a court of record in all matters within the jurisdiction of the Commission.

Duties and Powers of First Assistant Clerk.

12. That the first assistant clerk of the Commission shall have the powers, discharge the functions, and perform the duties in all matters within the jurisdiction of the Commission of a deputy clerk of a court of record, and shall perform as well the

duties of the clerk of the Commission during the absence of said clerk, and in case of the death, resignation, incapacity, or removal from office of the clerk, he shall be the acting clerk of the Commission until the vacancy in the office of clerk shall be filled.

Duties and Powers of the Bailiff.

13. That the bailiff of the Commission shall, in all matters within the jurisdiction of the Commission, have the powers, discharge the functions, and perform the duties of a sheriff or sergeant under the law; he shall preserve order during the public sessions of the Commission, and may make arrests and serve and make return on any writ or process awarded by the Commission, and execute any writ, order, or process of execution awarded upon the findings or judgments of the Commission in any matter within its jurisdiction.

Duties of the Stenographer, &c.

14. The stenographer and other assistants and subordinates of the Commission shall perform the duties required of them by law or by the Commission, under its rules, regulations, and requirements.

The Commission to Require its Officers to Enter into Bond; Amount, Conditions, and Recordation of Same.

15. The Commission shall require its clerk, first assistant clerk, and bailiff, before entering upon the discharge of the duties of their respective offices, each to enter into bond, with surety to be approved by the Commission, in such penalty as the Commission may deem sufficient (not in any case less than five thousand dollars), conditioned for the faithful performance of the duties of their respective offices, and for the prompt

and full accounting for and payment into the treasury of all moneys received by them, respectively, as officers of the Commission. The said bonds shall be made payable to the Commonwealth, and may be proceeded on and enforced in any circuit or corporation court in like manner as the official bonds of other officers of this Commonwealth, or of its courts. Said bonds shall be recorded in the record of the proceedings of the Commission, and the original bonds transmitted by its clerk to the auditor of public accounts, who shall file and preserve the same in his office.

Powers of the Commission.

16. The Commission shall have power and authority to require, by its rules, regulations, and requirements, all corporations chartered under the laws of this State, and all foreign corporations, doing business in this State, to perform and discharge any public duty or requirement imposed upon such corporations by the Constitution, or by law, and may require all such corporations to furnish such reports to the Commission as may be provided by the Constitution, or by law, and the Commission may enforce against any such corporation, by its judgments and processes, any fine or other penalty imposed by law for the failure of any such corporation to perform any public duty required of it, or to comply with any requirement of law, or any lawful regulation of the Commission in reference to the same. The Commission may require the establishment by transportation companies of separate waiting rooms, at all stations, wharves, or landings for the white and colored races.

Duties of the Commission with Respect to Transportation Companies, &c.

17. It shall be the duty of the Commission to make inquiry and examination from time to time into the acts and proceed-

ings of railroad, canal, steamboat, steamship, or other transportation companies, and other chartered common carriers and transmission companies, doing business in this State, their officers and agents, for the purpose of ascertaining whether anything has been done or omitted in violation or contravention of their charters, or of the law.

THE COMMISSION TO EXAMINE ALL RAILROADS, &C.

18. The Commission shall examine all the railroads and the works and equipment thereof, and the works and equipment of all other transportation companies, and keep itself informed as to their physical condition and the manner in which they are operating with reference to the security and accommodation of the public, and the compliance of the several companies with the provisions of their charters and the laws of the Commonwealth. And the provisions of this section shall apply to all railroads and other transportation companies, and to the corporations, trustees, receivers, or other person owning or operating the same.

THE COMMISSION TO GIVE NOTICE TO TRANSPORTATION OR TRANSMISSION COMPANY OF VIOLATION OF LAW, AND COMPEL COMPLIANCE WITH SAME.

19. Whenever, in the judgment of the Commission, it shall appear that any transportation or transmission company has violated any law of this State, or has neglected in any respect or particular to comply with the terms of its charter, or with the provision of any of the laws of the Commonwealth, it shall give notice thereof in writing to such company or the person operating the same; and if the violation or neglect be continued after such notice, the Commission shall take such proceedings and impose such fines or penalties within its jurisdic-

tion as shall be necessary to compel such transportation or transmission company to comply with the terms of its charter and the provisions of the laws of the Commonwealth.

THE COMMISSION TO COMPEL RAILROAD TO MAKE REPAIRS WHEN NECESSARY; NOTICE; RAILROAD MAY BE HEARD THEREON; PENALTY.

20. Whenever in the judgment of the Commission it shall appear that repairs are necessary upon any railroad, or that any addition to its rolling stock, or addition or improvement in the equipment of any other transportation line, or any enlargement of or improvement in the stations or station houses, waiting rooms, wharves, or landings, or any change in the mode of operating the road, or other transportation line, and conducting its business, is reasonable and expedient in order to promote the security and accommodation of the public, it shall give ten days' notice in writing to the company or person operating the road, or other transportation line, of the improvements and changes which it adjudges to be proper, designating when and where the contemplated action in the premises will be considered and disposed of, and such company or person shall be afforded a reasonable opportunity to introduce witnesses and to be heard thereon, and any such company or person failing or refusing to obey any valid order or requirement of the Commission in the premises within such reasonable time, not less than ten days, as shall be fixed in the order of the Commission, it may impose upon any such company or person the fines and penalties prescribed by the Constitution and by law for its or his failure to obey the orders and requirements of the Commission and the requirements of the law, and enforce the payment and collection thereof by its judgment and processes.

When Commission to Make an Examination of Road; Notice; Fines; How Same may be Enforced.

21. Upon the complaint and application of the mayor or counsel of any city or town, or the board of supervisors of any county within which any part of any transportation or transmission line is located, it shall be the duty of the Commission to make an examination of the physical condition and operation thereof. Before proceeding to make such examination in accordance with such application, the Commission shall give to the applicants and the corporation or person operating any such line reasonable notice in writing, of the time and place of entering upon the same. If upon such examination it shall appear to the Commission that the complaint alleged by the applicant is well founded, it shall so adjudge and shall notify such corporation or person of its adjudication; and if such corporation or person fail for sixty days after such notification to remove the cause of complaint, the Commission shall impose the fines and penalties provided by the Constitution and by law for its failure to obey the orders and requirements of the Commission, and enforce the collection thereof by its judgments and processes.

Commonwealth to be Complainant, &c.

22. That in all complaints, proceedings, contests, or controversies by or before the Commission, whether instituted by the Commonwealth or by the Commission of its own motion, the Commonwealth shall be complainant, and the party against whom the complaint is preferred, or the proceeding instituted, shall be the defendant. Any party complainant or defendant in any complaint, proceeding, contest or controversy shall be entitled to process, to convene parties, compel the attendance of witnesses, or the production of books and papers, in any proceeding or hearing before the Commission.

PROCEEDINGS TO BE AS IN COURTS OF RECORD.

23. That the Commission, on hearing of all complaints, proceedings, contests, or controversies, in which it shall be called upon to decide or render judgment in its capacity as a court of record, shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of this Commonwealth, in like manner as complainants and defendants in the courts of this Commonwealth.

PERJURY.

24. That any person who shall wilfully swear falsely touching any material fact or matter in any complaint, proceeding, investigation, contest or controversy instituted or pending before the Commission shall be deemed guilty of perjury.

THE COMMISSION TO CAUSE ITS RULES OF PROCEDURE, &C., TO BE ENTERED OF RECORD AND PRINTED; DISTRIBUTION OF COPIES.

25. That the Commission shall cause its rules of order and procedure to be entered upon the records of its proceedings and to be printed, as well as all amendments and additions to the same, and shall furnish copies thereof to county and city clerks and to any citizen of this State upon application therefor.

THE COMMISSION TO SUMMON PARTY BEFORE IMPOSING FINE OR PENALTY; CONTEMPTS; NOTICE TO BE GIVEN AS TO RULES OR ORDERS DIRECTED AGAINST ONE OR MORE COMPANIES; GENERAL ORDER, RULE, &C., TO BE PUBLISHED; SUSPENSION OF ORDER DURING APPEAL; PENALTIES.

26. That the Commission, before entering any judgment for any fine or penalty imposed by law shall summon or rule the party upon whom such fine or penalty is sought to be im-

posed to appear before the Commission at some public session to be designated in the process, to show cause against such fine or penalty, and why the same should not be imposed and judgment rendered therefor: provided, that the provisions of this section shall not apply to contempts committed in the presence of the Commission while in public session; and before the Commission shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such order, rule, regulation, or requirement shall first be given by the Commission at least ten days' notice of the time and place when and where the contemplated action of the Commission in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done; and before the Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published in substance, not less than once a week for four consecutive weeks, in one or more newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement made by the Commission shall be published at length for the time and in the manner above specified before it shall go into effect, and shall also, as long as it remains in effect, be published in each subsequent report of the Commission. Any corporation failing or refusing to obey any valid order or requirement of the Commission within such reasonable time, not less than ten days, as shall be fixed in the

order, may be fined by the Commission such sum, not exceeding five hundred dollars, as the Commission may deem proper, or in such sum in excess of five hundred dollars as may be prescribed or authorized by law; and each day's continuance of such failure or refusal after due service upon such corporation of the order or requirement of the Commission shall be a separate offense: provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties: provided, further that the power of the Commission to impose the penalties prescribed by the Constitution, or by the law, for the failure or refusal of any corporation to obey its valid orders and requirements, shall not be construed to relieve any company or corporation from the penalties now prescribed or hereafter to be prescribed by law for the failure or refusal of any such company or corporation to perform any public duty or requirement prescribed, or which may be prescribed by any law of this State, but that such penalties may be enforced by the Commission in addition to the penalties authorized to be imposed by the Constitution and by law for failure or refusal to obey any of its valid orders or requirements.

Powers of the Commission with Respect to Rendering and Enforcing Judgments, Penalties, &c., Collection and Payment of Same into the Treasury.

27. The Commission shall have power and authority in all matters of which it has jurisdiction under the Constitution, or the laws of this Commonwealth, to render and enter up judgment for fines and penalties, or for the recovery of money, in any complaint, proceeding, contest, or controversy, whether instituted of its own motion or otherwise, and to issue process of

execution thereon, which may be levied and executed in like manner as executions awarded and issued upon the judgments or decrees of the courts of law or equity of this Commonwealth. All judgments of the Commission for fines or penalties, for contempt, or for the violation of any provision of the Constitution, or the laws of this State, or for the failure or refusal of any corporation to obey and observe the lawful rules, regulations, or orders of the Commission, shall be entered up in favor of the Commonwealth, and when collected shall be paid by the clerk of the commission into the treasury, as hereinbefore provided.

THE COMMISSION TO HAVE POWER TO PUNISH FOR CONTEMPT BY FINE OR IMPRISONMENT, &C., TO THE SAME EXTENT AND MANNER AS COURTS; COMMITMENT TO JAIL, &C., WRIT OF ERROR.

28. The Commission shall have powers and jurisdiction possessed and exercised under the law by the courts of record of this Commonwealth to punish for contempt by fine or imprisonment, or by both, any person duly summoned to appear and testify before the Commission who shall fail or refuse to appear and testify, without a lawful excuse, or who shall refuse to answer any proper question propounded to him by the Commission in the discharge of its duty or who shall conduct himself in a rude, disrespectful, or disorderly manner before the Commission, or any of them, deliberating in the discharge of duty in public session, and may, for any such contempt, impose the same penalties, either by fine or imprisonment, or by both, and render and enter up judgment in any such proceeding and enforce the same by process of execution or by commitment to jail, or by both, in the same manner and by like process and proceedings, and to the same extent, as may by law be done by any of the courts of this Commonwealth. The Commission may

commit any person adjudged by it guilty of contempt to the jail of any city or county in the Commonwealth, and the jailer thereof shall receive such person upon the commitment of the Commission, attested by its clerk, first assistant clerk, or acting clerk, and confine such person in the jail of his city or county, as the case may be, for the term of imprisonment specified in the commitment, unless sooner discharged therefrom by due process of law. The said jailer shall receive for the board of any person so committed the same allowance made by law for other persons confined in such jail, which shall be paid out of the public treasury upon the allowance of the Commission, certified as hereinbefore provided. The fines and judgments of the Commission in any contempt proceeding may be reviewed, affirmed, reversed, or modified, as justice may require, on writ of error from the Commission to the Supreme Court of Appeals.

THE COMMISSION MAY AWARD AND ISSUE, SERVE, EXECUTE, AND RETURN PROCESS, &C., AND COMPEL ATTENDANCE OF WITNESSES, AS COURTS.

29. That the Commission shall, in all matters within its jurisdiction, have the power and authority to award and issue, have served, executed, and returned, any writ, notice, process, order, or order of publication which may by law be awarded, issued, served, executed, or returned by or to any court of law or equity, in this Commonwealth, for the purpose of compelling the attendance of witnesses, the production of books and papers, the convening of parties, or the enforcement and execution of its findings, orders, or judgments.

WRITS, &C., TO RUN IN THE NAME OF THE COMMONWEALTH; BY WHOM ISSUED AND SERVED; FEES; DUTIES OF BAILIFF; PENALTY FOR FAILURE TO EXECUTE WRIT, &C.

30. That all writs, processes, and orders of the Commis-

sion shall run in the name of the Commonwealth, and shall be attested by its clerk, or first assistant clerk, or acting clerk, and shall be directed to its bailiff, and may be served, executed, and returned by the said bailiff, in any city or county of the State, or by the sergeant or sheriff, or any constable, of any city or county in this State within his bailiwick. All writs, notices, processes, or orders of the Commission may be served, executed, and returned in like manner and upon like persons or property as the processes, writs, notices, or orders of the courts of record of this Commonwealth, and when so served, executed, and returned, shall have the same legal effect. The bailiff or other officer serving or executing any writ, notice, process, or order of the Commission shall receive the same fees and commissions allowed by law for like services to the sergeants and sheriffs of the cities and counties of this State: provided, that the bailiff of the Commission shall account for and pay to its clerk all fees and commissions received by him for any services which he may render, which shall be accounted for and paid by the clerk of the Commission into the treasury, as hereinbefore provided. The bailiff, or any other officer hereinbefore named, who shall fail to execute and return any writ, notice, process, or order of the Commission shall be subject to the penalties prescribed by law for the failure to execute and return the process of any court, which penalties may be enforced by the judgment of the Commission.

THE COMMISSION TO TAX AND COLLECT LIKE FEES AND COSTS AS COURTS; FEES AND MILEAGE OF WITNESSES.

31. That the Commission shall cause to be taxed and collected in all complaints, proceedings, contests, or controversies instituted or pending before it, like fees and costs taxed and collected for like services by the officers of the courts of this

Commonwealth; also, the fees and mileage of witnesses attending upon its public sessions, and may enter judgment for the same and issue execution thereon, which execution may be levied and executed in like manner as execution issued upon the judgments or decrees of the courts of law or equity of this Commonwealth: provided, that no costs shall be taxed or collected against the Commonwealth except on appeals of corporations under the provisions of section one hundred and eighty of the Constitution, which have been aggrieved by the assessments and ascertainments made by the Commission under sections one hundred and seventy-six and one hundred and seventy eight of the Constitution.

Judgments of the Commission to be a Lien on Real Estate when duly Docketed, &c.; How Enforced; Clerks to Docket Judgments Certified by the Clerk of the Commission.

32. That the judgments of the Commission for the recovery of money, fines, or penalties shall be a lien on the real estate of the judgment debtor when duly docketed and indexed in the judgment lien docket as the judgments of the courts of record are required by law to be docketed and indexed, in the county or city in which the real estate of the judgment debtor is located, and the lien of such judgment may be enforced in equity before any court having jurisdiction to enforce liens. The clerks of the courts of the several cities and counties shall docket all such judgments on the lien docket of their respective courts when a copy thereof, certified by the clerk of the Commission, shall be presented for that purpose.

When Sessions of the Commission Public; Judgments to be Rendered in Public Session; When Judgment Effective; Number, Time and Commencement of Session; One Regular Session Every Three Months.

33. That the sessions of the Commission for the hearing of any complaint, proceeding, contest, or controversy instituted or pending before it, whether of its own motion or otherwise, shall be public, and its findings, decisions and judgments shall be announced and rendered in public session. The judgments of the Commission for fines or penalties, or for the recovery of money, shall take effect as of the date of such judgment, and when allowed by the Commission in its order and entered up, the judgment shall bear interest from that date. The Commission may, by its rules, provide for the number of its regular public sessions in each year, the time of their commencement, their duration, and for their adjournment; and may also provide for extra or special public sessions when, in their judgment, such extra or special public sessions may be necessary or required. The Commission shall hold at least one regular public session in every three months in each year.

Appeal to Supreme Court; How Taken and Perfected; to be Heard Promptly, &c.; How Section Construed.

34. That the Commonwealth or any party aggrieved by any final finding, order, or judgment of the Commission shall have, of right, regardless of the amount involved, an appeal to the Supreme Court of Appeals, same to be taken and perfected within six months from the date of such final finding, order, or judgment, and the Supreme Court of Appeals may, on petition of the Attorney-General, or any other party so aggrieved, if said petition be presented within six months from the date of the final finding, order, or judgment of the Commission, award

a writ of supersedeas to any such final finding, order, or judgment, and may review, affirm, reverse, or modify the same, as justice may require, and enter therein such order as may be right and just. All such appeals shall be taken and perfected, heard and determined, and the mandate of the Supreme Court of Appeals certified down to the Commission in the same manner as appeals in equity causes from the circuit or corporation courts of this Commonwealth to the supreme court; except such appeals shall be heard and disposed of promptly by the Supreme Court, irrespective of its place of session, next after *habeas corpus* and Commonwealth's cases already on the docket; provided, however, this section shall not be construed to interfere in any way with the provisions of subsections (*d*), (*e*), (*f*), and (*g*) of section one hundred and fifty-six of the Constitution, as to appeals from the action of the Commission, prescribing rates, charges, or classification of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusal to approve a suspending bond, or requiring additional security thereon, or an increase thereof; but shall be construed to provide only for appeals from the final findings, orders, and judgments of the Commission in cases not expressly provided for by the Constitution.

Suspending Bond on Appeal; Costs, &c.

35. That the Commission may require a suspending bond on any appeal, in such penalty and with such surety thereon as it may deem sufficient, and may during the pendency of any appeal, at any time require the increase of any such bond, or additional security thereon: provided, however, there shall be of right, regardless of the amount, an appeal from the action of the Commission refusing to approve a suspending bond, or re-

quiring an increase thereof, or additional security thereon, in like manner as provided by subsections (*d*), (*e*), (*f*), and (*g*) of section one hundred and fifty-six of the Constitution. The Commission may also require bond for the payment of costs in such penalty, and with such security, as it may deem sufficient, in any complaint, proceeding, contest, or controversy instituted or pending before it. All suspending bonds, and bonds for the payment of costs, taken or required to be taken by the Commission, shall be made payable to the Commonwealth, and may be enforced in the name of the Commonwealth, by motion or other legal proceeding or remedy before the Commission, or in any circuit or corporation court of this Commonwealth having jurisdiction of a motion or action on such bonds, and the process and proceedings thereon shall be as provided by law upon the bonds of the like character required and taken by any court of this Commonwealth, and the Commission or such circuit or corporation court may render and enter up like judgments upon such bonds as may, by law, be rendered and entered upon bonds of like character, and process of execution shall issue upon such judgments, and may be levied and executed as provided by law in other cases.

TRANSPORTATION COMPANY UPON FINAL DECISION OF APPEAL TO REFUND AMOUNT COLLECTED PENDING THE APPEAL IN EXCESS OF THAT AUTHORIZED; PENALTY; AMOUNT OF JUDGMENT DISTRIBUTED AMONG THOSE ENTITLED THERETO.

36. That if any transportation company, upon the final decision of an appeal from the action of the Commission prescribing rates, charges, or classification of traffic, confirming or modifying the action of the Commission, shall fail to refund in the manner and within the time prscribed in the notice of the

Commission all amounts which the appealing company may have collected pending the appeal, in excess of that authorized by such final decision, upon notice to such corporation by the Commission of such final decision, then the Commission, after thirty days' notice to any such company, may, unless the amount required by such order be paid to the clerk of the Commission, render and enter judgment in the name of the Commonwealth, for the use of the persons, firms, and corporations entitled to the same, against any such company for the aggregate amount of such collections and for costs, and may enforce the amount of such judgment and costs by process of execution as hereinbefore provided as to the enforcement of the judgments of the Commission. The Commission shall, upon the collection of said judgment, forthwith distribute the amount thereof, through its clerk, among the parties entitled thereto, respectively in such manner as it may by its rules or orders prescribe, and shall, upon the payment or collection of any such judgment, enter the same satisfied upon its records, and have the same entered satisfied on the judgment lien docket of the court of any city or county where the same may have been docketed, and the satisfaction of any such judgment shall be a bar to any further action or recovery against any such corporation to the extent of such recovery.

ACCIDENTS.

37. The Commission may investigate the cause of any accident on any transportation line which, in its judgment, shall require investigation.

TRANSPORTATION OF CONVICTS AND INSANE PERSONS.

38. The Commission is authorized to enter into contracts with the several railroads and other transportation companies,

doing business in this State, for the transportation of convicts, insane or other persons, who are cared for by the State, and of sheriffs and all necessary guards, to and from the penitentiary and the several State hospitals in this State, upon such terms as the Commission and the several companies may agree, not to exceed two cents per mile for each person transported under such contract. Said contracts may be renewed or extended for such time as the Commission shall deem to be to the interest of the State.

THE COMMISSION TO DETERMINE THE MOST DIRECT ROUTE, FURNISH SCHEDULES, &C., TO HOSPITALS AND PENITENTIARY.

39. The Commission shall determine the most direct and practicable route from each courthouse by which to convey persons to the penitentiary and the several State hospitals, and shall file with the auditor of public accounts, the superintendent of the penitentiary, the superintendents of the several State hospitals, and the clerks of the several counties and corporations, a schedule of the route determined upon.

THE COMMISSION TO FURNISH SCHEDULE CERTIFICATES OF TRANSPORTATION; BY WHOM SIGNED; HOW COMPANIES MAY COLLECT ON SAME.

40. The Commission shall furnish with such schedule certificates of transportation in the form agreed upon in its contract with the companies. Said certificates shall be signed by the clerk of the Commission, and shall be taken up by the conductor or other agent authorized by said companies to collect fare, as other tickets or fares are collected. They shall be presented by the companies holding the same, either monthly or quarterly, as may be determined upon by the Commission

and the companies, to the auditor of public accounts, who shall examine the same, and if found correct, pay them as other claims against the State are audited and settled.

THE COMMISSION TO FURNISH COMPILATION OF STATUTE LAWS, &C., GOVERNING COMMON CARRIERS, DISTRIBUTION OF SAME; RULES TO BE POSTED.

41. The Commission shall, annually, on the first day of January, publish a compilation of the statute laws governing common carriers in the State of Virginia, together with a compilation of the rules and regulations prescribed for their government by the Commission, and shall furnish a sufficient number of copies to each railroad company or transportation company, or person operating the same, to enable such company or person operating the same, to post and keep posted conspicuously in every passenger and freight depot of the company, a copy of such laws, rules and regulations; and every such company, or person operating the same, is hereby required to see that such copies, when furnished by the Commission, are posted and kept posted in the manner prescribed.

SEAL OF THE COMMISSION; TO WHAT IT MAY BE AFFIXED; ITS FORCE AND EFFECT; FEE.

42. That the Commission shall have and use a common seal, to consist of a circular die with the coat-of-arms of Virginia and the title "State Corporation Commission" stamped upon the face of the die, and shall have power to affix said seal to any paper, record, or document when necessary for the purpose of authentication, and such seal, when so affixed to any paper, record, or document emanating from the Commission or its clerk's office, shall have the same force and effect for authentication as the seal of any court of record in this State. The clerk

of the Commission shall collect a tax of one dollar for each impression of said seal upon any paper, record, or document, for which tax he shall account to the auditor of public accounts, and pay the same into the public treasury as hereinbefore provided.

DOCKET.

43. That the Commission shall keep a docket of all complaints, proceedings, contests, and controversies instituted or pending before it, and all cases shall be numbered on the docket in the order in which they were instituted, and the papers therein jacketed and numbered in the same consecutive order, and when finally determined and disposed of, the papers and files shall be filed and preserved in the same numerical order and properly indexed for convenient future reference.

ALLOWANCE FOR EXPENSES, &C., TO BE PAID OUT OF THE PUBLIC TREASURY; COMPENSATION, MILEAGE, &C., OF WITNESS.

44. The Commission shall, by order entered upon the records of its proceedings, make all allowances to be paid out of the public treasury for expenses, witness fees, and mileage, and for service of process, and when so allowed and certified by its clerk to the auditor of public accounts, the last-named officer shall draw his warrant for the payment of the amount of any such allowances out of the public treasury: provided, that the Commission shall not allow to any witness exceeding one dollar per day for his attendance, nor exceeding five cents per mile for each mile traveled to and from the place of attendance, and shall not make any allowances to be paid out of the public treasury save when the expenses incurred, the witness attendance, or the services of process, is at the instance of the Commission, or on behalf of the Commonwealth.

Register of Corporation; List of Charters to be Furnished by Secretary of the Commonwealth.

45. That the Commission shall have made and kept in its clerk's office a register of all corporations, which register shall contain the corporate names of all corporations heretofore chartered and existing at this date, so far as the same may be obtainable, and those hereafter chartered by the laws of this State, and of all foreign corporations heretofore or hereafter licensed to transact business in this State, and as to domestic corporations shall contain also the following information, to-wit: Date of incorporation. Names and residences of officers and directors. Amount of capital stock, and whether preferred or common, or both, and the amount of each. Amount of bonds to be issued. Nature of corporate enterprise or business to be conducted. The place of its principal or general office or place of business.

The secretary of the Commonwealth shall forthwith prepare and furnish to the Commission a list of all charters recorded in his office up to April first, nineteen hundred and three, containing the above information so far as shown by the records of his office.

The Commission to Issue all Charters, &c., and to Certify Same under its Seal to the Secretary of the Commonwealth; Recordation; Granting License to Foreign Corporations; Fees.

46. The Commission shall issue all charters and all amendments, extensions, and renewal of charters, upon application, complying with the provisions of the incorporation laws of this State, and when any charter, or amendment, extension, or renewal of charter is issued, shall certify the same, under its seal, to the secretary of the Commonwealth for recordation as required by law, and the Commission shall have the granting of

all licenses to foreign corporations to transact business in this State. The Commission shall, before approving any application or petition for a charter, or granting any license to any foreign corporation to transact business in this State, require the payment of the fees prescribed by law, and on or before the first day of March in each year, in addition to the franchise tax and the fees otherwise prescribed by law, require each domestic corporation, other than a purely charitable institution, and each foreign corporation doing business in this State to pay a registration fee as follows: Where the proposed maximum capital stock is fixed at fifteen thousand dollars or under, or if such corporation is organized on a mutual basis or without capital stock, five dollars; in excess of fifteen thousand dollars and not over fifty thousand dollars, ten dollars; in excess of fifty thousand dollars and not over one hundred thousand dollars, fifteen dollars; in excess of one hundred thousand dollars and not over three hundred thousand dollars, twenty dollars; and in excess of three hundred thousand dollars, twenty-five dollars; all of which fees shall be collected and received by its clerk and accounted for and paid into the public treasury as hereinbefore provided.

THE COMMISSION TO DESIGNATE DEPOSITORY; DEPOSITS; CHECKS; OFFICER COLLECTING JUDGMENT TO PAY SAME WITHIN TEN DAYS; PENALTY.

47. That the Commission shall designate some State depository as a place of deposit for the moneys received by its clerk under this or any future act of the General Assembly, and shall require its clerk to deposit therein all moneys received by him at least once in every twenty-four hours, and all checks upon said depository drawn by said clerk shall be countersigned by the chairman or acting chairman of the Commission. That

the bailiff of the Commission, or any sergeant, sheriff, or constable who shall collect any judgment, or any part thereof, rendered by the commission, shall, within ten days after such collection, pay the amount thereof, either in current funds or by certified check, to the clerk of the Commission. Any officer of the Commission, or any sergeant, sheriff, or constable who shall omit or fail to perform any of the requirements of this section, shall be fined not less than five hundred dollars nor more than one thousand dollars, which may be imposed and judgment rendered therefor and enforced by the Commission. All proceedings against any such officer and the surety on his official bond, may be had as provided by law in reference to official bonds, for default in the accounting for, or payment over, of any moneys collected or received by him under the provision of this act.

THE COMMISSION TO NOTIFY CORPORATION OF THE AMOUNT OF REGISTRATION FEE.

48. That the Commission shall annually, on or before the first day of December, notify each corporation subject to a registration fee of the amount thereof, and when the same is payable, and when paid its clerk shall promptly receipt therefor to the corporation paying the same, such notice to be mailed to the last address furnished by such company.

FREE TRANSPORTATION TO MEMBERS OF THE COMMISSION.

49. That all transportation companies operating in this State shall, on the order of the Commission, attested by its clerk, or on an order signed by any member of the Commission, furnish free transportation to the members of the Commission and its officers, when traveling on official business, and the order for such transportation shall show that the same is desired for official business.

Supplies, Printing, Expenses, &c.

50. That the Commission shall have authority to purchase all necessary supplies, and to have all necessary printing and publishing done, and to secure all telephone and telegraph service necessary to the efficient discharge of its duties, and the same shall be paid out of the fund appropriated for its incidental and contingent expenses: provided, however, that all printing necessary for the Commission shall be done by the public printer on its order.

Report of the Commission.

51. That the Commission shall, on or before the first day of December in each year, tabulate and publish in statistical form such reports made to it in pursuance of the Constitution and laws of this State, as required by subsection (*a*) of section one hundred and fifty-six of the Constitution proper, and shall on the same date in each year, make report to the Governor as required by subsection (1) of said section, to be by him laid before the General Assembly at each regular session thereof.

Impeachment.

52. That any member of the Commission who, during the term of his office, shall be directly or indirectly employed by, or hold any office in relation to, any transportation or transmission company, or in any wise become interested therein, financially, or shall engage in the practice of law, or be guilty of misfeasance or malfeasance in office, shall be impeached and removed from office in the same manner provided for the impeachment and removal of judges of the Supreme Court of Appeals; and any officer of the Commission for like causes, or for neglect of duty, or when, in the judgment of the Commis-

sion, the public service will be promoted thereby, may be removed from office by the Commission.

BOARD OF PUBLIC WORKS AND RAILROAD COMMISSIONER TO SURRENDER RECORDS, BOOKS, &C., TO THE COMMISSION.

53. The board of public works and the railroad commissioner shall on the second day of March, nineteen hundred and three, or as soon thereafter as requsted by the Commission, surrender and deliver to the Commission the records, books, files, and papers of their respective offices, and thereafter said records, books, files, and papers shall be and remain a part of the records, books, papers and files of the Commission.

SALARIES.

54. That the annual salaries of the members and officers of the Commission shall be as follows: Each commissioner, four thousand dollars; the clerk, two thousand dollars, the first assistant clerk, fifteen hundred dollars; the stenographer, twelve hundred dollars; and the bailiff, nine hundred dollars; and the auditor of public accounts shall draw his warrant upon the treasury for the payment of said salaries in equal monthly payments for each month of their respective terms of office.

NOT TO IMPAIR JURISDICTION OF COURTS; CONCURRENT JURISDICTION.

55. This act shall not be construed to take away or impair the jurisdiction of any court of this Commonwealth to hear and determine any proceeding, suit or motion of which it now has jurisdiction, for the enforcement of any fine or penalty against any corporation under the laws of this State, but that the powers and jurisdiction of the Commission to hear, determine, and enforce such fines and penalties shall be construed to be concurrent.

POWERS AND DUTIES VESTED IN COMMISSION.

56. The Commission is hereby charged with all the duties and vested with all the rights, property, functions, and powers heretofore performed, vested in, and exercised by the board of public works, except in so far as the same may be in conflict with the Constitution and laws of this State, and the Commission shall particularly perform the duties and exercise the powers heretofore performed and exercised by said board, prescribed in sections fifty-nine to seventy-eight, inclusive of this act.

THE COMMISSION OR SOME MEMBER TO ATTEND THE SALE OF WORK OF INTERNAL IMPROVEMENT IN WHICH THE STATE IS INTERESTED.

57. The Commission, or some member thereof, shall, and is hereby directed and authorized to, attend the sale of any work of internal improvement in which the State is a stockholder or otherwise interested, whether such sale be made by virtue of mortgage, judgment, decree, or other lien.

WHEN STATE MAY PROCEED AGAINST COMPANY BY *quo warranto* AND SELL THE WORKS FOR ABANDONMENT OR FAILURE TO USE; DEED OF CONVEYANCE TO BE EXECUTED; COLLECTION OF DEBTS AND PROCEEDS OF SALE; PURCHASER TO BECOME CORPORATION WITH PRIVILEGES, &C., OF OLD COMPANY.

58. If the works of any internal improvement company be not commenced and be completed within the time prescribed by law, or by its charter, or if after such works be completed, the company abandon them, or for three successive years cease to use and fail to keep them in good repair, in each of these cases the State may proceed against such company by writ of

quo warranto, or information in the nature of a writ of *quo warranto,* and if in any such proceeding there is a judgment against the company, the Commission shall forthwith take possession of its work and property and sell the same (except the debts owing to the company), and convey the works and property so sold to the purchaser thereof as soon as the purchase money has been paid, the deed of conveyance to be executed by the chairman of the Commission under its seal. The Commission shall, moreover, collect, as far as practicable, the debts aforesaid, and apply the proceeds thereof, and of the said sale, after deducting the costs and expenses of the collection and sale, to the discharge of the liabilities of the company, and whatever remains after said liabilities are discharged, pay into the treasury of the State. Upon such conveyance to the said purchaser, he shall forthwith be a corporation by any name which may be set forth in such conveyance, or any writing signed by him and admitted to record in the county or corporation wherein the conveyance shall be admitted to record; and to the corporation thus created all the provisions of section twelve hundred and thirty-four of the Code shall apply, except that the franchises, rights, and privileges to which such corporation shall succeed and the duties which it shall perform, shall be such as would have been had or performed by the first company but for the judgment aforesaid in the proceeding by writ of *quo warranto,* or information in the nature of a writ of *quo warranto,* save only as in said section provided.

The Commission May Convey State's Interest in Road to County.

59. It shall be the duty of the Commission, with the consent of the board of supervisors of any county given at any regular meeting by a two-thirds vote of all elected in such

county, where in their opinion the public interest will be promoted thereby, to transfer and convey the State's interest in any turnpike or plank road, or any part thereof, to the county or counties in which said road lies. The transfer shall be made by a formal order to be entered upon the minutes of the proceedings of the Commission, and a copy to be transmitted by its clerk to the clerk or the circuit or county court for record in the clerk's office in each county where the said road lies.

The Commission to Collect Dividends, &c., from Work in which the State is Interested.

60. The Commission shall be vested with power to collect any fund or dividend due from any work of internal improvement in which the State is interested, and to pay the same into the treasury to the credit of the sinking fund.

Proxies for Stock held by State.

61. The Commission, for all works in which the State may hold stock heretofore subscribed and not disposed of, shall from time to time appoint one or more proxies to represent the stock held by or on behalf of the State in the company having control of such work: provided, that the present proxies shall hold over until their successors are appointed.

Duty of State Proxies.

62. In cases in which it may be desired by the Commission, its proxies shall cause to be transmitted to it copies of the reports of the proceedings of the directors of the companies in which they are proxies, the proceedings of the stockholders thereof, and other documents relating to the works, and shall make such reports as the Commission may require or to the proxies may seem proper.

State Directors.

63. In every company to the stock of which the board of public works or the State has heretofore subscribed and which has not been disposed of, the Commission shall appoint such portion of the directors as shall bear to the whole number of the directors of such company the same proportion, as nearly as possible, that the stock held on behalf of the State in such company bears to the whole capital stock thereof.

When Appointed.

64. The appointment of directors in a company, according to the preceding section, shall be made by the Commission before each annual meeting therein.

Terms of Directors and Proxies.

65. Proxies and directors appointed by the Commission shall be in office from the time such appointment is in force until their successors are appointed, unless sooner removed. When a proxy fails to attend at any meeting, the Commission, without removing him, may make a temporary appointment, to be in force during his absence.

The Commission to Keep Register of the Property of the State.

66. The Commission and the second auditor shall cause to be registered, in books to be kept in their respective offices for the purpose, all claims, stocks, bonds, choses in action, and all property, real or personal, due or belonging to the State, with such description thereof as will enable easy reference to the same by any State officer or person interested.

Money Recovered by Action in Circuit Court of Richmond.

67. Any money forfeited to the Commission, and any money which ought to be paid into the public treasury to the credit of the fund for internal improvement, shall be recovered, with interest on such money from the time the same ought to be paid by motion, after fifteen days' notice, or by action in the Circuit Court of the city of Richmond. The second auditor shall institute and prosecute in the name of the Commonwealth the proceedings after an order for such motion or action shall have been made by the Commission.

Agents for the Collection of Debts, &c.

68. The Commission may appoint agents for the collection of its debts or claims, and authorize them to secure payment thereof on such terms as it may approve, except it shall not appoint an agent to collect any judgment, fine, or penalty rendered or imposed by the Commission.

When Commission may Purchase Estate taken under Execution.

69. When the estate of any person taken under execution or for sale under any decree or deed of trust for any such debt or claim will not sell for the amount thereof, the Commission may purchase such estate.

May Sell and Convey any Estate so Purchased.

70. The Commission may sell any estate so purchased, at such time and on such terms as the Commission may deem advantageous, and the Commission shall execute a deed conveying to the purchaser all the interest which the Commission may have in such land.

Compensation of Agent under this Act.

71. For the services of any agent under this act, the Commission may allow compensation not exceeding in any case, five per centum on the money actually paid into the treasury.

The Commission to Fix Tolls, &c.

72. Where the tolls of any canal, navigation, or bridge company are not prescribed by its charter, the Commission shall fix such tolls as may seem to it reasonable, and may alter the same at its pleasure.

Assent by Stockholders to Sec. 65 of this Act.

73. If in any company incorporated and organized before the first day of July, eighteen hundred and fifty, to the stock of which the board of public works or the State has, before or since that date, subscribed, a resolution be adopted in general meeting of the stockholders (by the vote of the majority of the stockholders, other than the State), assenting to section sixty-five of this act, the same shall thenceforth be of the same force in respect to such company that it would be if it had formed a part of the act incorporating such company. If such assent be not given, the votes in the meetings of the stockholders of such company and the appointment of directors therein shall continue to be according to the laws in force on the day before the Code of eighteen hundred and eighty-seven took effect, unless it be a company whose charter is, by the terms thereof, subject to be altered, amended, or modified by the General Assembly; in which case the said section sixty-five shall be of the same force in respect to it as if such assent had been given.

SALE BY JAMES RIVER AND KANAWHA COMPANY OF ITS WORKS, &C., TO RICHMOND AND ALLEGHANY RAILROAD COMPANY.

74. That so much of the act entitled "an act to authorize the James River and Kanawha Company to make sale and transfer of all its works, property, and franchises to the Richmond and Alleghany Railroad Company, and to define the powers and duties of the board of public works in reference thereto," approved February twenty-seventh, eighteen hundred and seventy-nine, as has not been carried into effect, shall continue in force, and the Commission shall exercise all the powers and perform all the duties conferred and imposed upon the board of public works by the said act.

THE COMMISSION TO MAKE REPORT SHOWING CONDITION OF WORK OR COMPANY IN WHICH STATE HAS AN INTEREST.

75. The Commission shall make report to the General Assembly at each regular session, showing the condition of each work made on the State account, or to the stock of which the board of public works or the State had heretofore subscribed, and giving such other information in relation thereto as it may deem pertinent. And the second auditor shall also report to the General Assembly, at such regular session a succinct statement, relative to every such work, showing the gross amount of the year's income therefrom, the net balance of such income remaining, after paying current expenses, and interest on debts due on account of the work, and what percentage, such net balance is on the capital expended. On or before the first day of October the said reports shall be delivered to the superintendent of public printing, and he shall cause the same to be printed.

76. That subsection twelve of section one hundred and eighty-three, and sections twelve hundred and twelve, twelve hundred and thirty-six, twelve hundred and thirty-nine, twelve

hundred and fifty-four, twelve hundred and ninety-eight, twelve hundred and ninety-nine, thirteen hundred, as amended by an act of the General Assembly, approved March fourth, nineteen hundred; thirteen hundred and one, thirteen hundred and two, thirteen hundred and three, thirteen hundred and six, thirteen hundred and seven, thirteen hundred and eight, thirteen hundred and ten, thirteen hundred and eleven, as amended by an act of the General Assembly, approved March fourth, nineteen hundred; thirteen hundred and twelve, thirteen hundred and thirteen, thirteen hundred and fourteen, thirteen hundred and fifteen, thirteen hundred and sixteen, thirteen hundred and seventeen, thirteen hundred and eighteen, thirteen hundred and nineteen, thirteen hundred and twenty, thirteen hundred and twenty-one, thirteen hundred and twenty-two, thirteen hundred and twenty-three, thirteen hundred and twenty-four, thirteen hundred and twenty-five, thirteen hundred and twenty-six, thirteen hundred and twenty-seven, thirteen hundred and twenty-eight, thirteen hundred and twenty-nine, thirteen hundred and thirty, thirteen hundred and thirty-one, thirteen hundred and thirty-two, thirteen hundred and thirty-three, and thirteen hundred and thirty-seven of the Code of eighteen hundred and eighty-seven, and sections eleven, twelve, and thirteen of the act of the General Assembly of Virginia, approved March third, eighteen hundred and ninety-two, entitled an act to further regulate and control common carriers doing business in this State, and further defining the duties of the railroad commissioner in relation thereto, be, and the same are hereby, repealed.

77. This act shall be in force from its passage.

III.

An Act

To require the State Corporation Commission to fix and prescribe storage, demurrage and car service charges which may be collected by railroad and other transportation companies on freight transported, or to be transported by them and to be paid by them on freight delayed and cars not promptly furnished or placed by them, with rules and regulations governing same.

Approved May 16, 1903.

1. Be it enacted by the General Assembly of Virginia, that from and after the passage of this act power is hereby conferred on the State Corporation Commission of the State of Virginia, and it is required to fix and prescribe a schedule of rates for storage of freight in depots and for demurrage or car service on freight in car load lots, to be charged by railroad and other transportation companies doing business in this State, and to fix the time after the reception of freight at destination at which such charges of storage, demurrage, or car service shall begin, with power to vary the same according to the value and character of the freight stored, the nature of the place of destination, the residence of the consignee, and such other facts as in its judgment, should be considered in fixing the same.

2. That the State Corporation Commission shall fix and prescribe a schedule of detention charges to be paid by railroad and other transportation companies to the consignee in case of delay in the delivery of freight in carloads or less at destination, or where shipments are held an unreasonable length of

time at the station or siding at which they originate, or at any intermediate point, and for carrying freights, express packages, and all other effects by and beyond the place of final destination, without authority from the consignee; and the Commission shall also fix and prescribe rules and regulations covering the placing of empty cars and a schedule of detention charges to be paid by railroad companies to consignors when cars are not placed for loading in accordance with said rules and regulations after application has been made therefor, when said charges shall, when paid, be in full of any and all claims for damages growing out of such failure: provided, however, that the owner of the freight may, at his election, waive said charges and elect to claim such actual damage as he may have sustained instead of such charges.

3. This act shall be in force from its passage.

IV.

STATUTE GIVING FREE AND UNLIMITED RIGHT OF APPEAL.

(Section 19 of Chapter II of An Act Concerning Public Service Corporations, Approved January 18th, 1904.)

19. Any person or corporation aggrieved by anything done or omitted in violation of any of the provisions of this act, by any public service corporation chartered or doing business in this State, shall have the right to make complaint of the grievance and seek relief by petition against such public service corporation before the State Corporation Commission, sitting as a court of record. If the grievance complained of be established, the State Corporation Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same and to enjoin obedience to the requirements of this act, and the said Commission, sitting as a court of record, shall also have jurisdiction, by mandamus, to compel any public service corporation to observe and perform any public duty imposed upon public service corporations by the laws of this Commonwealth, subject as to any matter arising under this section to the right of appeal to the Supreme Court of Appeals by either party as of right in the mode prescribed by law, but nothing in this section shall be construed to confer any power upon the State Corporation Commission which is forbidden to the courts by section twelve of chapter four of this act.

V.

RULES OF PRACTICE AND PROCEDURE BEFORE THE STATE CORPORATION COMMISSION OF VIRGINIA.

Public Sessions.

1. The regular public sessions of the Commission, sitting as a court, for the hearing of contested cases and matters properly coming before it, will be held at its offices, in the city of Richmond, on the second Monday in January, April, June, September and November in each year. These sessions may be adjourned from time to time, and shall last so long as the business before the Commission, and the public interests may require. These sessions may be adjourned, during their respective terms, to any other place in the State, upon order of the Commission, that the public necessity or the convenience of the parties require an adjournment.

Special judicial sessions of the Commission may be held at any time upon order of the Commission, or a majority of its members, in the city of Richmond, or elsewhere in the State, for the hearing of all matters over which the Commission has jurisdiction.

Parties.

2. All complaints, proceedings, contests, or controversies, before the Commission, shall be instituted in the name of the Commonwealth, as complainant, and the party against whom the complaint is preferred, or the proceeding instituted, shall be the defendant; in all proceedings instituted by the Commission of its own motion, the complainant shall be, "The Commonwealth at the relation of the State Corporation Commission"; in all other complaints and proceedings, instituted by

parties, the complainant shall be styled "The Commonwealth at the relation of ———."

Any person, firm, corporation, or association, or any commercial body, may institute a complaint before the Commission. When instituted by an unincorporated association or mercantile body, the complaint must be in the name of a committee of not less than two persons on behalf of such association or body.

When the complaint concerns anything done, or omitted to be done, by a single carrier or other corporation, no other need be made a party, but if it relates to joint tariffs, or questions in which two or more carriers or other corporations are interested all such must be made parties. A complaint may embrace several carriers, or lines of carriers, operated separately, in the same proceeding, when the subject matter of the complaint involves substantially the same violation of the law, or of the rules and regulations of the Commission, by the several carriers or lines. Persons or carriers not originally parties may apply, in any pending case or proceeding, for leave to intervene, and to be heard upon the questions involved. Such application must be by petition, verified by oath, which must set forth the petitioners' interest in the proceeding.

Petitions and Complaints.

3. All complaints for the redress of alleged grievances or violation of law by the defendant must be in writing and addressed to the Commission. Such petition or complaint must distinctly and plainly set forth the grounds of complaint, the items being numbered, and the petition or complaint must be verified by affidavit. The name of the corporation, or other parties complained against, must be stated in full, and the address of the complainant, with the name and address of his attorney or counsel, if any, must appear upon the petition,

where the complaint is made otherwise than on the motion of the Commission.

NOTICE.

4. The petition or complaint may be filed before the Commission, or with its clerk, and, thereupon, a notice, in the form of a writ, shall be issued, according to law, by the clerk, directed to the bailiff of the Commission or other proper officer, summoning the defendant or defendants to appear before the Commission on the day named therein, which shall not be less than ten days from the filing of the complaint. The said writ and notice, and a copy of the complaint, shall be served upon the defendant or defendants, and return made according to law.

ANSWERS.

5. Upon the day named in the writ, or notice, the defendant or defendants shall file before the Commission an answer in writing, specifically admitting or denying, by items, the material allegations of the complaint, and setting forth the facts which will be relied upon to support any such denial. The answer shall be verified by affidavit, and be signed by the attorney or counsel, if there be such. If the parties are ready, upon the filing of the answer, the Commission may proceed at once to hear the matter of contest. If either party be not prepared for the hearing, then an adjournment may be had and the day for the hearing fixed upon the application of either party, in the discretion of the Commission.

Instead of answering the complaint, defendant or defendants may demur to the same, filing a demurrer in writing on the return day.

AMENDMENTS.

6. Upon the application of any party, amendments to any

complaint or answer in any proceeding or investigation may be allowed by the Commission, in its discretion.

Stipultions or Agreed Facts.

7. The parties to any complaint or proceeding before the Commission may, by stipulation in writing, filed with the Commission agree upon the facts, or any portion thereof, involved in the controversy, which stipulation shall be recorded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

Hearings.

8. Upon the filing of the answer, the hearing will proceed at once, or the Commission will assign the time and place for the same. Witnesses will be examined orally before the Commission, unless testimony or facts are agreed upon, as otherwise provided in these rules. The petitioner or complainant must prove the existence of the facts complained of, unless they are admitted, or the defendants be in default by failing to answer. Fact alleged in the answer must be proved by the defendant or defendants, unless admitted by complainant. In cases of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case may require.

Depositions and Witnesses.

9. The testimony of any witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Commission after the same is at issue by the filing the answer. Such depositions must be after notice, and before the officer required and allowed by the statutes of Vir-

ginia. Any party, complainant or defendant, shall be entitled to process to compel the attendance of witnesses or the production of books and papers before the Commission. Such process will be issued, for proper service and return by the clerk of the Commission, upon application of any party to the proceeding. When depositions are taken they must be returned to the clerk of the Commission, as depositions are required by law to be returned to the clerk of a court of chancery.

Argument.

10. Whenever requested by the proper authorities, the Attorney-General of the State may represent the complainant in any proceeding.

Arguments may be made orally before the Commission or written or printed briefs may be filed in any case within such time as may be prescribed by the Commission in such case. For convenience in reading and filing, it is requested that, whenever practicable, in cases of importance, arguments be printed.

Special Matters.

11. In the performance of special functions of a judicial nature, imposed upon it directly by law, and not instituted by any complaint such as the assessment of property of corporations and other like matters, such notices will be given and proceedings be had, as are required by the statute under which the Commission acts in the performance of such duties.

General Business.

12. The offices of the Commission, on the fourth floor of the City Hall of Richmond, will be open for the transaction of business on week days from 9 A. M. to 6 P. M. When the Commission is not in session, applications for charters and all

papers to be presented to the Commission, or filed in its offices, may be left with the clerk. Official communications by mail should be addressed to the "State Corporation Commission," and not to the chairman or any member of the Commission individually.

COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

CITY OF RICHMOND, *8th of January,* 1906.

The books, papers and records of the State Corporation Commission having been removed from the quarters heretofore occupied by it in the City Hall of the City of Richmond to the rooms assigned to it for the use of the members and the clerical force of the Commission, including a room assigned to it for use as a hearing or courtroom, all in the restored Capitol Building of the State; and the Commission being now in occupancy and possession of the said rooms and said courtroom in the Capitol Building.

It is ordered, That the same be and remain its permanent quarters and hearing or courtroom until other provision is made by law.

VI.

DECISION OF THE MAIN QUESTION IN THIS CASE BY THE SUPREME COURT OF APPEALS OF VIRGINIA.

"At the outset of our consideration of the questions raised by the petition for appeal, we are confronted with the proposition that Sections 155 and 156, Art. 12, of the Constitution of Virginia (Va. Code 1904, pp. ccl, ccli), and the statutes enacted in pursuance thereof, are unconstitutional and void; and that the State Corporation Commission, thereby established, is an illegitimate and invalid tribunal, without power to enter the order complained of. The ground urged in support of this contention is that the Constitution and laws mentioned concentrate in the body thereby created legislative, executive, and judicial functions, and require it to exercise the powers of all three of these departments of government, in contravention of Section 5 of the Virginia Bill of Rights (Va. Code 1904, p. ccix), which provides "that the legislative, executive and judicial departments of the State should be separate and distinct;" and are also in violation of the fourteenth amendment to the Constitution of the United States, for the reason that both the organic law and the legislative enactments operate to deny the equal protection of the laws to that class of companies and corporations over which the Commission is given jurisdiction, and to deprive those companies of their property without due process of law.

This court recognizes the validity of the State Corporation Commission as a legally constituted tribunal of the State, clothed with legislative, judicial, and executive powers. *Atlantic Coast Line* vs. *Commonwealth,* 102 Va. 599, 46 S. E. 911; *Norfolk, etc., Company* vs. *Commonwealth,* 103 Va. 294, 49 S. E. 39.

In the last named case, at page 295 of 103 Va., page 41 of 49 S. E., it is said: 'The State Corporation Commission, created by constitutional authority, is the instrumentality through which the State exercises its governmental power for the regulation and control of public service corporations. For that purpose it has been clothed with legislative, judicial and executive powers."

The concentration of these three powers of government in the Corporation Commission is not in contravention of the Bill of Rights. That declaration is part of the Constitution, which expressly provides that 'except as hereinafter provided, the legislative, executive, and judiciary departments shall be separate and distinct,' thereby recognizing the well-accepted view that the administration of the government would be wholly impracticable if that general maxim were strictly, literally, and unyieldingly applied in every possible situation.

The Federal government, as well as the State governments, abounds with illustrations of the intermingling of such powers in one person or body. The British Constitution fully recognizes the wisdom of keeping separate these three great departments of the government, and yet it furnishes a most conspicuous illustration of the fact that it is impossible for any government to literally fulfill the terms of that maxim without any qualification

—the House of Lords is a part of both the legislative and of the judicial branches of that government. It is undoubtedly true that a sound and wise policy should keep these great departments of the government as separate and distinct from each other as practicable. But it is equally true that experience has shown that no government could be administered where an absolute and unqualified adherence to that maxim was enforced. The universal construction of this maxim in practice has been that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another to a limited extent. This practical construction of the maxim has been recognized with approval by the Supreme Court of the United States.

In the case of *Calder* vs. *Bull*, 3 Dall. (U. S.) 386, 1 L. Ed. 648, which has been frequently cited, it appeared that the legislature of the State of Connecticut had undertaken to set aside the judgment and award a new trial in a private litigation which had been concluded in the courts of that State. This action of the Connecticut legislature was attacked in the Supreme Court of the United States, and, amongst other things, it was charged to be invalid because it was a legislative invasion of the judiciary department of government. No one denied that this was true, but the court held that, under the Constitution of Connecticut, the legislature could perform judicial functions, and that there was nothing in the Federal Constitution with which such a state of affairs conflicted; that the legislature of Connecticut 'acted in a double capacity as a house of legis-

lation with undefined authority, and as a court of judicature in certain exigencies.' Patterson J., in *Calder* vs. *Bull,* 3 Dall. (U. S.) 394-395, 1 L. Ed. 648. In pointing out that this combination of legislature and court in one body was not in violation of the Federal Constitution, Iredell, J., in the same case, adverted to the fact that the House of Lords in England was the supreme appellate court of that country; and Cushing, J., said that 'although the act (of the Connecticut legislature) is a judicial act, it is not touched by the Federal Constitution.'

The same point was reiterated by the Supreme Court in *Satterlee* vs. *Matthewson,* 2 Pet. (U. S.) 380, 413, 7 L. Ed. 458, in which the court said: 'There is nothing in the Constitution of the United States which forbids the legislature of a State to exercise judicial functions. * * * It may safely be affirmed that no case has ever been decided in this court upon a writ of error to a State court, which affords the slightest countenance to this objection.'

The doctrine that it is competent for a State to unite in one board or tribunal some of the legislative, executive, and judicial powers of the government, as well as the further proposition, that when a State does this it violates no prohibition of the Federal Constitution, and that any such question is one for the determination of the State, its action in the matter being accepted as final, is well supported by the more recent case of *Dreyer* vs. *Illinois,* 187 U. S. 71, 84, 23 Sup. Ct. 28, 32 (47 L. Ed. 79) in which Mr. Justice Harlan, delivering the unanimous opinion of the court, says: 'Whether the legislative, executive, and judicial powers of a State

shall be kept altogether distinct and separate, or whether persons or collections of persons, belonging to one department, may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State, and its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the fourteenth amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution.' Story's Const. (5th Ed.) 393. Again: 'Indeed, there is not a single Constitution of any State in the Union which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.' Story's Const. (5th Ed.) 395. See also *Reetz* vs. *Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; *Lieberman* vs. *Van de Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305.

A further ground of objection urged to Sections 155

and 156 of the Virginia Constitution, and the laws passed in pursuance thereof, is, that in so far as the Constitution and laws of Virginia subject the companies mentioned in those sections, in the matter of their public duties and charges, to the control of a commission clothed with legislative, executive, and judicial functions, and deny to them access to the law courts of the State, which are not clothed with 'legislative, executive, and judicial functions,' such as every other person, private or corporate, has access to, said Constitution and acts make a discrimination against such companies and deny to them the equal protection of the laws, and deprive them of their property without due process of law.

There is no denial of the equal protection of the laws when all persons in like condition and under like circumstances are treated in the same way, made liable to the same regulations, and subjected to the same penalties for failure to comply with the just requirements of such regulations. The jurisdiction complained of applies alike to all companies and persons engaged in the business of transportation, and there is no discrimination against any railroad or other transportation company, or in favor of any person who engages in the business of a common carrier. All stand alike, and are dealt with alike. The Supreme Court of the United States has, in many cases, held that the fourteenth amendment does not impair the right of the States to classify any subjects with which their laws deal, provided only that the classification is a reasonable and not a mere arbitrary one, without any reason to support it.

In *Barbier* vs. *Connolly*, 113 U. S. 32, 5 Sup. Ct. 360, 28 L. Ed. 923, it is said: 'Class legislation, discriminat-

ing against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its action, it affects alike all persons similarly situated, is not within the amendment.'

In *Missouri Ry. Co.* vs. *Mackey*, 127 U. S. 209, 8 Sup. Ct. 1163, 32 L. Ed. 107, it is said: 'The objection that the law * * * deprives the railroad companies of the equal protection of the laws, is even less tenable than the one considered. It seems to rest upon the theory that the legislation which is special in its character is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of our legislation is special, either in the object sought to be attained by it or in the extent of its application * * * such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the laws because it is special in its character. * * * When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.' See also, Kentucky Ry. Tax Cases, 115 U. S. 322, 6 Sup. Ct. 57, 29 L. Ed. 414; *Pac. Ex. Co.* vs. *Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Magoun* vs. *Ill. Trust and Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Tinsley* vs. *Anderson*, 171 U. S. 106, 18 Sup. Ct. 805, 43 L. Ed. 91; *Orient, etc., Co.* vs. *Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Field* vs. *Barber Asphalt Co.*, 194 U. S. 621, 24 Sup. Ct. 784, 48 L. Ed. 1142.

In the last case cited the doctrine announced in many other cases is reiterated in these words: 'It is not the purpose of the fourteenth amendment, as has frequently been held, to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred, or liabilities imposed.'

That the appellants are not deprived of their property without due process of law is clear from what has been already said, and the authorities cited.

In *Iowa, etc., Co.* vs. *Iowa*, 160 U. S. 393, 16 Sup. Ct. 345, 40 L. Ed. 467, it is said that 'it is clear that the fourteenth amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided.'

The constitutional provision, creating the Corporation Commission, expressly directs and requires that the proceedings before it shall be by 'due process of law.' Under that proceeding, the railroad companies are duly notified and summoned to appear at a specified time and place before an impartial tribunal provided by law to hear and determine the matter in dispute, and show cause, if any they can, why a suggested or proposed action should not be given effect. At such hearing the railroads are allowed, as a matter of right, to be represented by counsel, to examine and cross-examine witnesses, to produce any and all legal evidence in their

behalf, and to be fully heard in their own behalf on all matters of law or fact which they may desire to allege or put forward in their own defense. And all this before any decision or action adverse to their interests can be rendered. It has been held that the right of appeal is not an essential element in 'due process of law.' *Reetz* vs. *Michigan*, 188 U. S. 508, 23 Sup. Ct. 390, 47 L. Ed. 563. Out of abundant caution, however, the constitutional provision authorizing this proceeding also authorized an appeal by the railroads from any decision of the Commission in such proceedings with which the railroads may be dissatisfied. And whereas, in almost every other case involving the rights of individuals, the right of appeal is addressed to the sound discretion of the appellate court, yet in this case the appeal is given to railroads absolutely, as of right; and whereas, in most appeals involving the rights of individuals, there is a jurisdictional amount limit, yet in this case the railroads are given an appeal without limit as to the amount involved. It is difficult to conceive of more complete provision for 'due process of law' than is secured to the parties concerned by these proceedings.

That the State has the inherent power of regulating and controlling public service corporations operating within her borders and of prescribing the facilities and conveniences which shall be furnished by them, is no longer an open question in this country. The just regulation and control of such companies has been a difficult problem for many years. The Virginia State Corporation Commission, as created and defined by Article 12 of the Constitution, was devised as a solution of that problem. The exigencies of the situation made it neces-

sary that the Commission should be clothed, to some extent, with legislative, executive and judicial functions, and in view of what has been said, and in the light of the authorities cited, we are of opinion that the section of the State Constitution, and the statutes enacted in effectuation thereof, from which the State Corporation Commission derives its existence and its powers, violate no provision of the Federal Constitution, and are in conflict with no principle essential to the preservation of liberty. It follows, therefore, that the State Corporation Commission is a legitimate and valid tribunal, with full power to determine the subject matter of controversy presented by this proceeding."

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NOTICE OF STATE CORPORATION COMMISSION OF JULY 31ST., 1906.

"OFFICE OF THE STATE CORPORATION COMMISSION.

RICHMOND, VA., 31st day of July, 1906.

To the Several Steam Railroad Companies Doing Business in Virginia and all Persons Interested:

Take notice that the State Corporation Commission will, in the City of Richmond, on Thursday, the first day of November, 1906, at 12 o'clock, noon, in accordance with the authority conferred by the Constitution of Virginia, and the statutes enacted by the General Assembly of Virginia pursuant thereto, hear and consider any objections which may be urged against a rule, regulation, order or requirement of the Commission fixing and prescribing a maximum rate or charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia said maximum rate to be observed whether the transportation be entirely over the line of one railroad company or joint transportation over the lines of two or more companies; and whether the contract for transportation of a passenger or passengers be evidenced by an ordinary ticket between stations, by a mileage book or otherwise; the Commission to have as authorized by law, the power and authority from time to time, and as often as circumstances may require, to change or revise the rate, or by rules, regulations and requirements to provide for the more convenient and expedient putting into effect and proper observance of said maximum rate. At the said hearing and consideration of the said maximum rate of two cents per mile, the method, time and extent of promulgation and putting into effect of the same will be heard and de-

termined by the Commission, to the end that a maximum rate for passenger transportation may be put into effect and be made applicable to all steam railroad companies doing business in Virginia, and be properly observed by them in the transportation of passengers.

BEVERLEY T. CRUMP,
Chairman.

H. C. STUART,
JOSEPH E. WILLARD,
Commissioners."

ORDER OF THE STATE CORPORATION COMMISSION OF APRIL 27TH, 1907.

"Commonwealth of Virginia, at the Relation of the State Corporation Commission.

vs.

Steam Railroad Companies.

IN THE MATTER OF PRESCRIBING A MAXIMUM PASSENGER RATE.

CITY OF RICHMOND, *27th Day of April,* 1907.

The State Corporation Commission having carefully considered all the proceedings herein, and all the testimony, exhibits and statements adduced and filed before it in this proceeding, and having put its conclusions in writing, which are made a part of the record herein, the Commission, in order to carry out its said conclusions, now makes the following order and regulations and prescribes the following maximum rates to be observed by all the steam railroad companies operating in the State of Virginia in the transportation of passengers.

1. *It is Ordered*, That on and after the first day of July, 1907, the following steam railroad companies, viz:

Norfolk & Western Railway Company
Chesapeake & Ohio Railway Company
Atlantic Coast Line Railroad Company
Seaboard Air Line Railway Company
Southern Railway Company
Richmond, Fredericksburg & Potomac Railroad Company
Washington Southern Railway Company
New York, Philadelphia & Norfolk Railroad Company
Virginia & Southwestern Railway Company
Louisville & Nashville Railroad Company

shall put into effect and observe a maximum rate of two cents per mile in the intrastate transportation of passengers in Virginia, said maximum rate to be observed whether the transportation be entirely over the line of one of the said railroad companies or joint transportation over the lines of two or more companies; and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than two cents per mile for the transportation of passengers over the lines controlled and operated by them respectively, except as otherwise allowed in this order or from time to time by the State Corporation Commission.

2. *It is Ordered*, That a maximum rate of two and one-half cents per mile for the intrastate transportation of passengers be fixed and prescribed to go into effect on and after the first day of July, 1907, on the following divisions, or branches, of the Southern Railway Company, which are now excepted from the operation of the maximum rate of two cents per mile hereinabove fixed.

Norfolk Division, extending from Pinners Point to Danville, 204 miles, exclusive of so much of the

said division as may be in the State of North Carolina;

Franklin Branch, extending from Franklin Junction to Rocky Mount, 37 miles;

Claremont Branch, extending from James River Junction to Claremont, 50 miles.

From and after the said date it shall be unlawful for the Southern Railway Company to charge or collect a greater sum than two and one-half cents per mile for the intrastate transportation of passengers over these divisions, or branches, unless otherwise directed or allowed by the Commission.

3. *It is Ordered*, That on and after the first day of July, 1907, the following steam railroad companies, viz,

Chesapeake Western Railway
Cumberland Valley & Martinsburg Railroad Company
Danville & Western Railway Company
Indian Creek & Pound River Railroad Company
Marion & Rye Valley Railway Company
Nelson & Albemarle Railway Company
Valley Railroad Company of Virginia
Virginia-Carolina Railway Company
Virginia Southern Railroad Company
Winchester & Potomac Railroad Company
Winchester & Strasburg Railroad Company
Norfolk & Southern Railway Company

shall put into effect and observe a maximum rate of three cents per mile in the intrastate transportation of passengers in Virginia, and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than three cents per mile for the transportation of passengers over the lines controlled and operated by them, respectively, except as otherwise allowed from time to time by the State Corporation Commission.

4. *It is Ordered*, That on and after the first day of July, 1907, the following steam railroad companies, viz.

Big Sandy & Cumberland Railroad Company
Black Mountain Railway Company
Interstate Railroad Company
Lick Creek & Lake Erie Railroad Company
Mt. Airy & Eastern Railway Company
New River, Holston & Western Railroad Company
Potomac, Fredericksburg & Piedmont Railroad Company
Surry, Sussex & Southampton Railway Company
Tidewater & Western Railroad Company
Virginia Anthracite Coal and Railroad Company
Virginia & Kentucky Railway Company
Wise Terminal Company

shall put into effect and observe a maximum rate of three and one-half cents per mile in the intrastate transportation of passengers in Virginia, and on and after the said date it shall be unlawful for the said railroad companies, or any of them, to charge or collect a greater sum than three and one-half cents per mile for the transportation of passengers over the lines controlled and operated by them respectively, except as otherwise allowed from time to time by the State Corporation Commission.

5. *It is Further Ordered*, That in applying the foregoing maximum passenger rates prescribed for the several railroads in Virginia, the railroad companies may charge and collect a minimum rate of ten cents per passenger for any single haul.

6. The payment of fares subject to the maximum rate herein prescribed shall entitle the passenger to the same transportation of baggage as now allowed by the carriers under and in connection with the present rates, and no steam railroad company operating in Virginia shall change or alter the rules governing the rights of passengers with respect to the transportation of baggage in Virginia, without the consent of the Commission first obtained.

7. Steam Railroad Companies operating in Virginia may charge and collect in addition to regular ticket rates the fixed sum of ten cents from all cash fare passengers who had been afforded reasonable opportunity for purchasing ticket before boarding train; provided that the Conductor shall in all such cases deliver to passengers a receipt for the amount collected redeemable at any ticket office of the Company within thirty days from date of issue.

It is Ordered, That the Clerk of the Commission do forthwith publish this order in full in one of the newspapers of general circulation published in the City of Richmond, once a week for four successive weeks, as required by law."

PROVISIONS IN THE CONSTITUTION OF VIRGINIA OF 1902.

(Pollards Code of Va., Vol. 1, p. ccviii.)

"ARTICLE I.—BILL OF RIGHTS.

A Declaration of Rights made by the representatives of the good people of Virginia assembled in full and free convention: which rights do pertain to them and their posterity, as the Basis and Foundation of Government."

* * * * * * *

"SEC. 5. That the legislative, executive, and judicial departments of the State should be separate and distinct; and that the members thereof may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by regular elections, in which all or any part of the former members shall be again eligible, or ineligible, as the laws may direct."

* * * * * * *

"ARTICLE III.—DIVISION OF POWERS.

"SEC. 39. Except as hereinafter provided, the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."

"ARTICLE XII.—CORPORATIONS.

* * * * * * *

Sec. 155. State Corporation Commission; how appointed; term of office; how vacancies filled; who ineligible; qualifications of at least one member; how removed or impeached; officers, how elected; rules of order and procedure; general provisions; salaries; election of members after January 1, 1908; how vacancies then filled.

"A permanent commission, to consist of three members, is hereby created, which shall be known as the State Corporation Commission. The commissioners shall be appointed by the Governor, subject to confirmation by the General Assembly in joint session, and their regular terms of office shall be six years, respectively, except those first appointed under this Constitution, of whom, one shall be appointed to hold office until the first day of February, nineteen hundred and four, one, until the first day of February, nineteen hundred and six, and one, until the first day of February, nineteen hundred and eight. Whenever a vacancy in the commission shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term, subject to confirmation by the General Assembly as aforesaid. Commissioners appointed for regular terms shall, at the beginning of the terms for which appointed, and those appointed to fill vacancies shall, immediately upon their appointments, enter upon the duties of their office; but no person so appointed, either for

a regular term, or to fill a vacancy, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment or adjourn *sine die* without confirming the same, nor shall he be eligible for reappointment to fill the vacancy caused by such refusal or failure to confirm. No person, while employed by, or holding any office in relation to, any transportation or transmission company, or while in anywise financially interested therein, or while engaged in practicing law, shall hold office as a member of the said commission, or perform any of the duties thereof. At least one of the commissioners shall have the qualifications prescribed for judges of the Supreme Court of Appeals; and any commissioner may be impeached or removed in the manner provided for the impeachment or removal of the judge of said court. The commission shall annually elect one of their members chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed and subject to removal, by the commission. It shall prescribe its own rules of order and procedure, except so far as the same are specified in this Constitution or any amendment thereof. The General Assembly may establish within the department, and subject to the supervision and control, of of the commission, subordinate divisions, or bureaus, of insurance, banking or other special branches of the business of that department. All sessions of the commission shall be public, and a permanent record shall be kept of all its judgments, rules, orders, findings and decisions, and all reports made to, or by it. Two of the commissioners shall constitute a quorum for the transaction of business, whether there be a vacancy in the commission or not. The commission shall keep its office open for business on every day except Sundays and legal holidays. Transportation companies shall at all times transport, free of charge, within this State, the members of said commission and its officers, or any of them, when engaged on their official duties. The General Assembly shall

provide suitable quarters for the commission and funds for its lawful expenses, including pay for witnesses summoned, and costs of executing processes issued, by the commission of its own motion; and shall fix the salaries of the members, clerks, assistants and subordinates of the commission and provide for the payment thereof; but the salary of each commissioner shall not be less than four thousand dollars per annum. After the first day of January, nineteen hundred and eight, the General Assembly may provide for the election of the members of the commission by the qualified voters of the State; in which event vacancies thereafter occurring shall be filled as hereinbefore provided, until the expiration of twenty days after the next general election, held not less than sixty days after the vacancy occurs, at which election the vacancy shall be filled for the residue of the unexpired term."

SEC. *156 Powers, duties and method of procedure of Commission.*

"(*a*) Subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State. The Commission shall prescribe the forms of all reports which may be required of such corporations by this Constitution or by law; it shall collect, receive, and preserve such reports, and annually tabulate and publish them in statistical form; it shall have all the rights and powers of, and perform all the duties devolving upon, the Railroad Commissioner and the Board of Public Works, at the time

this Constitution goes into effect, except so far as they are inconsistent with this Constitution, or may be hereafter abolished or changed by law.

"(*b*) The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classification of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical conditions of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company. Before

the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the City of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws; provided, however, that nothing in this section shall impair the right which has hereto-

fore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the commission, as far as possible, to effect by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons.

"(*c*) In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the commission while in session and to enforce compliance with any of its lawful orders or requirements by adjudging, and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the commission sitting as a court, and afforded opportunity to introduce evidence and to be heard as well against the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right

to prescribe the rates and charges in connection therewith or with the assessment of the property of corporations, or the appraisement of their franchises for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the commission, within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed, or authorized by law; and each day's continuance of such failure or refusal after due service upon such corporation of the order or requirement of the commission, shall be a separate offense; provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

"(*d*) From any action of the commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in sub-section (e) of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges, or classifications of traffic, schedule facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for

proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the commonwealth shall be made the appellee; but, in the other case mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws provide for appeals from any other action of the commission by the commonwealth or by any person interested, irrespective of the amount involved. All appeals from the commission shall be to the Supreme Court of Appeals only; and in all appeals to which the commonwealth is a party, it shall be represented by the Attorney General or his legally appointed representatives. No court of this commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the commission, within the scope of its authority or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties: provided, however, that the writs of mandamus and prohibition shall lie from the Supreme Court of Appeals to the commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer.

"(*c*) Upon the granting of an appeal, a writ of *supersedeas* may be awarded by the Appellate Court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the Appellate Court, no action of the commission prescribing or affecting the rates, charges, or classifications of traffic of any transportation or transmission company shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceedings resulting from such appeal, until a suspending bond shall first have been executed and filed with, and approved by, the commission (or approved on review by the Supreme Court of Appeals), paya-

ble to the commonwealth, and sufficient in amount and security to insure the prompt refunding by the appealing corporation to the parties entitled thereto, of all charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the court on appeal. The commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any *supersedeas*), of the order or requirement appealed from, to keep such accounts, and to make to the commission, from time to time, such reports, verified by oath, as may, in the judgment of the commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the commission appealed from, together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company pending the appeal be not sustained on such appeal; and the commission shall also, from time to time, require such company, under like penalty, to give additional security on, or to increase, the said suspending bond, whenever, in the opinion of the commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid. Upon the final decision of such appeal, all amounts which the appealing company may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the company to the parties entitled thereto, in such manner, and through such methods of distribution as may be prescribed by the commission, or by law. All such appeals affecting rates, charges or classifications of traffic, shall have precedence upon the docket of the Appellate Court, and shall be heard and disposed of promptly by the court, irrespective of its place of session, next after the *habeas corpus*, and Commonwealth's cases already on the docket of the court.

"(*f*) In no case of appeal from the commission

shall any new or additional evidence be introduced in the Appellate Court; but the chairman of the commission, under the seal of the commission shall certify to the Appellate Court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission as may be selected, specified and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify. The commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the Appellate Court, upon disposing of the appeal. The Appellate Court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justice of the action of the commission appealed from, as well as any other matter arising under such appeal: provided, however, that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct; but the court may, when it deems necessary, in the interests of justice, remand to the commission any case pending on appeal, and require the same to be further investigated by the commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the commission by any party in interest), before the appeal is finally decided.

"(*g*) Whenever the court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such order as, in its opinion, the commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the

commission at the time the original order appealed from was entered. The right of the commission to prescribe and enforce rates, charges, classifications, rules and regulations, affecting any or all actions of the commission theretofore entered by it and appealed from, but based upon circumstances or conditions different from those existing at the time the order appealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the commission prescribing or altering such rates, charges, classifications, rules, or regulations, shall be retroactive.

"(*h*) The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit, or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the commission; but, in no such proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the commission, within the scope of its authority, and then in force, be questioned; provided, however, that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof.

"(*i*) The commission shall make annual reports to the Governor of its proceedings, in which reports it shall recommend, from time to time, such new or additional legislation in reference to its powers or duties, or to the creation, supervision, regulation, or control of corporations, or to the subject of taxa-

tion, as it may deem wise or expedient, or as may be required by law.

"(*j*) (No sub-div. "j" in official copy).

"(*k*) Upon the organization of the State Corporation Commission, the Board of Public Works and the office of Railroad Commissioner shall cease to exist, and all books, papers and documents pertaining thereto, shall be transferred to, and become a part of the records of, the office of the State Corporation Commission.

"(*l*) After the first day of January, nineteen hundred and five, in addition to the modes of amendment provided for in Article XV of this Constitution, the General Assembly, upon the recommendation of the State Corporation Commission, may, by law, from time to time, amend sub-sections (*a*) to (*i*), inclusive, of this section, or any of them, or any such amendment thereof; provided, that no amendment made under authority of this sub-section shall contravene the provisions of any part of this Constitution other than the sub-sections last above referred to or any such amendment thereof."

* * * * * * *

"SEC. 177. Each such railway or canal corporation, including also any such as is exempt from taxation as to its works, visible property, or profits, shall also pay an annual State franchise tax equal to one per centum upon the gross receipts hereinafter specified in section one hundred and seventy-eight, for the privilege of exercising its franchises in this State, which, with the taxes provided for in section one hundred and seventy-six, shall be in lieu of all other taxes or license charges whatsoever upon the franchises of such corporation, the shares of stock issued by it, and upon its property assessed under section one hundred and seventy-six: provided, that nothing herein contained shall exempt such corporation from the annual fee required by section one hundred and fifty-seven of this Constitution, or from assessments for street and other public local improvements au-

thorized by section one hundred and seventy; and provided, further, that nothing herein contained shall annul or interfere with, or prevent any contract or agreement by ordinance between street railway corporations and municipalities as to compensation for the use of the streets or alleys of such municipalities by such railway corporations."

"SEC. 178. The amount of such franchise tax shall be equal to one percentum of the gross transportation receipts of such corporations for the year ending June the thirtieth of each year, to be ascertained by the State Corporation Commission, in the following manner:

(*a*) When the road or canal of the corporation lies wholly within this State, the tax shall be equal to one percentum of the entire gross transportation receipts of such corporation.

(*b*) When the road or canal of the corporation lies partly within and partly without this State, or is operated as a part of a line or system extending beyond this State, the tax shall be equal to one percentum of the gross transportation receipts earned within this State, to be determined as follows: By ascertaining the average gross transportation receipts per mile over its whole extent within and without this State, and multiplying the result by the number of miles operated within this State: provided, that from the sum so ascertained there may be a reasonable deduction because of any excess of value of the terminal facilities or other similar advantages in other States over similar facilities or advantages in this State."

SEC. 179. Each corporation mentioned in sections One Hundred and Seventy-six and One Hundred and Seventy-seven shall annually, on the first day of September, make to the State Corporation Commission the report which the law, in force January the first, nineteen hundred and two, required to be made an-

nually to the Board of Public Works by every railroad and canal company in this State, not exempt from taxation by virtue of its charter, which report shall also show the property taxable in this State belonging to the corporation on the thirtieth day of June preceding, and its total gross transportation receipts for the year ending on that date. Upon receiving such report the State Corporation Commission shall, after thirty days' notice previously given, as provided by said law, assess the value of the property not exempt from taxation, of the corporation, and ascertain the amount of the franchise tax and other state taxes chargeable against it. All taxes for which the corporation is liable shall be paid on or before the first day of December following. The provisions of said law, except as changed by this article, shall apply to the ascertainment and collection of the franchise, as well as other taxes of such corporations. Said taxes, until paid, shall be a lien upon the property within the State of the corporation owning the same, and take precedence of all other liens or incumbrances.

SEC. 180. Any corporation aggrieved by the assessment and ascertainment made under sections One Hundred and Seventy-six and One Hundred and Seventy-eight may, within thirty days after receiving a certified copy thereof, apply for relief to the circuit court of the city of Richmond. Notice of the application, setting forth the grounds of complaint, verified by affidavit, shall be served on the State Corporation Commission, and on the Attorney-General whose duty it shall be to represent the State. The court, if of opinion that the assessment or tax is excessive, shall reduce the same; but, if of opinion, that it is insufficient, shall increase the same. Unless the applicant paid the taxes under protest, when due, the court, if it disallow the application, shall give judgment against it for a sum, by way of damages, equal to interest at the rate of one per centum per month

upon the amount of taxes from the time the same were payable. If the application be allowed, in whole or in part, appropriate relief shall be granted, including the right to recover any excess of taxes that may have been paid, with legal interest thereon, and costs, from the State or local authorities, or both, as the case may be; the judgment to be enforceable by mandamus or other proper process issuing from the court finally adjudicating the application. Subject to the provisions of Article Six of this Constitution the Supreme Court of Appeals may allow a writ of error to either party.

Sec. 181. After January the first, nineteen hundred and three, the system of taxation, as to the corporations mentioned in sections One Hundred and Seventy-six and One Hundred and Seventy-seven, shall be as set forth in sections One Hundred and Seventy-six to One Hundred and Eighty, inclusive; and for that year the franchise tax shall be based upon such gross receipts for the year ending the thirtieth day of June, nineteen hundred and three, and such system shall so remain until the first day of January, nineteen hundred and thirteen, and thereafter until modified or changed, as may be prescribed by law; provided, that, if the said system shall for any reason become inoperative, the General Assembly shall have power to adopt some other system."

(Section 19 of Chapter II of An Act Concerning Public Service Corporations, Approved January 18th, 1904.)

Pollards Code of Va. Vol 1 page 660.

19. Any person or corporation aggrieved by anything done or omitted in violation of any of the provisions of this act, by any public service corporation chartered or doing business in this State, shall have the right to make complaint of the grievance and seek relief by petition

against such public service corporation before the State Corporation Commission, sitting as a court of record. If the grievance complained of be estalished, the State Corporation Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same and to enjoin obedience to the requirements of this act, and the said commission, sitting as a court of record, shall also have jurisdiction, by *mandamus*, to compel any public service corporation to observe and perform any public duty imposed upon public service corporations by the laws of this Commonwealth, subject as to any matter arising under this section to the right of appeal to the Supreme Court of Appeals by either party as of right in the mode prescribed by law, but nothing in this section shall be construed to confer any power upon the State Corporation Commission which is forbidden to the courts by section twelve of Chapter four of this act.

An Act

To require the State Corporation Commission to fix and prescribe storage, demurrage and car service charges which may be collected by railroad and other transportation companies on freight transported, or to be transported by them, and to be paid by them on freight delayed and cars not promptly furnished or placed by them, with rules and regulations governing same.

Approved May 16, 1903.

1. Be it enacted by the general assembly of Virginia, That from and after the passage of this act power is hereby conferred on the State Corporation Commission of the State of Virginia, and it is required to fix and prescribe a schedule of rates for storage of freight in depots and for demurrage or car service on freight in carload lots, to be charged by railroad and other transportation companies doing business in this State, and to fix the

time after the reception of freight at destination at which such charges of storage, demurrage, or car service shall begin, with power to vary the same according to the value and character of the freight stored, the nature of the place of destination, the residence of the consignee, and such other facts as, in its judgment, should be considered in fixing the same.

2. That the State Corporation Commission shall fix and prescribe a schedule of detention charges to be paid by railroad and other transportation companies to the consignee in case of delay in the delivery of freight in carloads or less at destination, or where shipments are held an unreasonable length of time at the station or siding at which they originate, or at any intermediate point, and for carrying freights, express packages, and all other effects by and beyond the place of final destination, without authority from the consignee; and the commission shall also fix and prescribe rules and regulations covering the placing of empty cars and a schedule of detention charges to be paid by railroad companies to consignors when cars are not placed for loading in accordance with said rules and regulations after application has been made therefor, when said charges shall, when paid, be in full of any and all claims for damages growing out of such failure: provided, however, that the owner of the freight may, at his election, waive said charges and elect to claim such actual damage as he may have sustained instead of such charges.

3. This act shall be in force from its passage.

Acts of Va. Extra Session 1902-3-4, p. 392. Pollard Code of Va. Vol. 1 page 739.

An Act

To put into effective operation the provisions of the constitution relating to the creation, appointment and organization of the "State Corporation Commission," its jurisdic-

tion, powers, functions, and duties; the qualifications of the members and officers thereof, their appointment and salaries; the location of its offices, and places and times of its public sessions; its writs, processes, orders, findings and judgments; appeals from its orders, findings and judgments, and its expenses, etc.

Approved April 15, 1903.

Be it enacted by the General Assembly of Virginia as follows:

1. That as used in this act the term "corporation" or "company" shall include all corporations chartered by the acts of the General Assembly of Virginia, or under the general incorporation laws of this State, or doing business therein, and all trusts, associations, and joint-stock companies, having any powers or privileges not possessed by individuals or unlimited partnerships, and shall exclude all municipal corporations and public institutions owned or controlled by the State; the term "charter" shall be construed to mean a charter of incorporation by or under which any such corporation is formed; the term "transportation company" shall include any company, trustee, or other person owning, leasing, or operating for hire, a railroad, street railway, canal, steamboat, or steamship lines, also any freight-car company, car association or car trust, express company or company, trustee, or person in any way engaged in business as a common carrier over a route acquired, in whole or in part, under the right of eminent domain; the term "transmission company" shall include any company owning, leasing, or operating for hire, any telegraph or telephone line; the term "public service corporation" shall include all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public; the term "person" as used in this act shall include individuals, partnerships, and corporations, in the singular

as well as in the plural number; the term "the commission" shall be construed to mean the "State Corporation Commission," and the word "officers," when used in connection with said commission, shall be construed to mean any clerk, bailiff, assistant, or other appointee of the State Corporation Commission.

Appointment of Members of Corporation Commission; Terms; Commission.

2. That the governor shall, at least fifteen days before the first day of February, nineteen hundred and four, and at least fifteen days before the first day of February in each alternate year thereafter, appoint, subject to the confirmation of the General Assembly, in joint session, a citizen of this State, possessing the qualifications prescribed by the Constitution and by law to be a member of the "State Corporation Commission" (which shall be composed of three members), and whose term of office shall be that prescribed by the Constitution, and shall begin on the first day of February next succeeding his appointment and confirmation, except in the case of an appointee to fill a vacancy, or where the General Assembly fails to confirm an appointee to a full term of office before the date fixed by law for the commencement of his said term of office; in either case the term of office of any such appointee shall begin from the date of his qualification, and shall be for the unexpired portion of the term of office to which he shall be so appointed and confirmed. The members of the commission first appointed and confirmed, and those hereafter appointed and confirmed, shall hold office for the respective terms for which they have been, or may hereafter be, appointed, and until their respective successors in office have been appointed, confirmed, and qualified, unless they shall sooner be removed from office as prescribed by the Constitution or by law. The governor shall commission each of the members of the commission, and said commission shall be filed by the members in the office of the clerk of the commission.

Who Eligible to Serve as a Member of the Commission; Qualifications, etc.

3. That no person shall be eligible to serve as a member of the State Corporation Commission who, on the date of the commencement of his term of office, shall be employed by or hold any office in relation to any transportation or transmission company, or is in any way financially interested therein, or is engaged in the practice of law; nor shall any person be eligible to appointment as a member of the commission unless at the time of his appointment he is a qualified voter under the Constitution and laws of this State. One of the commissioners shall have the qualifications prescribed for judges of the supreme court of appeals.

Oath of Office.

4. That the members of the commission and the officers thereof, for whose appointment provision is made either by the Constitution or by law, before entering upon the discharge of the duties of their respective offices, shall, in addition to the oath prescribed by section thirty-four of the Constitution, severally take and subscribe the following oath, to-wit:

"I, ——— ———, do solemnly swear (or affirm) that at the present time I am not employed by, and do not hold any office in relation to any transportation or transmission company, and am not in any wise financially interested in any such company, and am not engaged in the practice of law, and that during the term of my office as——I will not either, directly or indirectly, be employed by or hold any office in relation to any transportation or transmission company, or in any wise be financially interested in any such company, or be engaged in the practice of law, so help me God."

But the said additional oath shall be taken and subscribed by the first members of the commission and by the officers thereof as soon as practicable after the passage of this act.

The oaths prescribed by the Constitution and this act

may be taken and subscribed before any officer authorized by the laws of this State to administer oaths, and shall be certified by such officer and recorded on the minutes of the proceedings of the commission, and then returned by its clerk as required by law as to the oaths of other State officers.

Offices of Commission to be Located in the City of Richmond; Where Notice, Writ or Process to be Returnable; When Public Sessions May be Held Elsewhere.

5. That the offices of the commission shall be located, and its public sessions held, in the city of Richmond, and all notices, writs, and processes issued by the commission shall be made returnable to, and command the corporation or person against whom directed to appear before the commission and answer on a certain day to be named therein: provided, however, the commission may in its discretion, if public necessity or the convenience of the parties require, hold public sessions elsewhere in the State, and may order any notice, writ, or process to be made returnable to the place of any such session; and for the holding of any such session the commission may occupy the court-room of the court-house of the city or county wherein such session may be held if said court-room shall not at the time be in use for the sessions of the court of any such city or county.

Offices.

6. That the rooms in the State library building now occupied as offices by the railroad commissioner shall be the offices of the commission, its clerk, bailiff, assistants, and subordinates until otherwise provided by law, and the register of the land office is hereby directed to have the said rooms fitted up in a suitable manner for the use and occupation of the commission and its officers. And the sum of five hundred dollars, or so much thereof as may be necessary, is hereby appropriated for that purpose out of any moneys in the treasury not otherwise appropriated.

Clerk, Assistant Clerk, Bailiff, Stenographer, &c., Qualifications and Terms.

7. That the commission shall have a clerk, a first assistant clerk, a bailiff, and a stenographer (who shall also be a typewriter), each of whom shall have the qualifications for office, be clothed with the power, discharge the functions and perform all the duties hereinafter prescribed, and such other duties as may be prescribed or required by the commission, and all of whom shall be appointed by the commission, and whose respective terms of office shall be as prescribed by the commission, and they shall be subject to removal by the commission as hereinafter in this act provided. The officers so appointed shall hold office until their successors have been appointed, qualified, and given bond as required by law, unless they shall sooner be removed from office, as hereinafter provided.

Officers to be Residents of the State and Qualified Voters.

8. That the officers of the commission shall at the time of their appointment be actual residents of this State, and qualified voters therein, under the Constitution and laws thereof.

The First Members of the Commission to Meet, Organize, Appoint Clerical Force, &c.; When the Commission to be Vested With Powers and Function of Office.

9. That the persons appointed, confirmed, and commissioned to be the first members of the commission under the provisions of section one hundred and fifty-five of the Constitution shall, as soon as practicable, meet in the office now used by the railroad commissioner and organize by taking and subscribing the oaths of office prescribed by the Constitution and by this act, and elect one of their number as chairman of the commission, appoint a clerk, a first assistant clerk, a bailiff,

and a stenographer; and when organized the commission shall have all the powers, discharge all the functions, and perform all the duties prescribed by the Constitution and by law.

When the Office to Become Vacant; How Vacancies Filled.

10. That if any person heretofore or hereafter appointed and confirmed to be a member of the commission or if any person appointed an officer of the commission, shall fail to qualify as required by the Constitution or by law, or to give any bond required by law of any such officer within thirty days after the date fixed by the Constitution or by law, as the commencement of the term of office to which he shall be appointed, then such office shall because of such failure to qualify, or to give any required bond within the time aforesaid, become vacant, and such vacancy shall, in the case of members of the commission, be filled as prescribed by section one hundred and fifty-five of the Constitution, and in the case of officers and appointees of the commission, be filled by appointment of the commission.

Duties of Clerk; Records; Certified Copies Same Legal Effect.

11. That the clerk of the commission shall keep a minute book in which shall be recorded all the proceedings, orders, findings, and judgments of the public sessions of the commission, and the minutes of the proceedings of each day's public session shall be read and approved by the commission and signed by its chairman, or acting chairman; he shall, subject to the supervision and control of the commission, have custody of and preserve all of the records, documents, papers, and files of the commission, or which may be filed before it in any complaint, proceeding, contest or controversy, and said records, documents, papers, and files shall be open to public examination in the office of said clerk to the same extent as the records

and files of the courts of this Commonwealth; he shall, when requested, make and certify copies from any record, document, paper, or file in his office, and if required, affix the seal of the commission thereto, and except when made at the instance of the commission or on behalf of the Commonwealth, he shall charge and collect the same fees as are fixed by law for like services rendered by the clerks of the courts of this Commonwealth, and any such copy, so certified, shall have the same faith, credit, and legal effect as copies made and certified by the clerks of the courts of this Commonwealth from the records and files thereof; he shall certify all allowances made by the commission to be paid out of the public treasury for witness fees, service of process, or other expenses; issue all notices, writs, processes or orders awarded by the commission; or authorized by law, or by the rules of the commission; he shall receive all fines and penalties imposed by the commission, all moneys collected on judgments, all registration fees required by law to be paid by corporations, all fees collected by any officer of the commission, and the tax on the seal of the commission, and shall keep an accurate account of the same and what disposition has been made thereof, together with all fees collected by him for services rendered, either by him or his assistants, and shall, at least once in every thirty days during his term of office, render a statement of all such receipts and collections to the auditor of public accounts, and pay the same into the treasury of the Commonwealth, and shall keep all such other accounts of such collections and disbursements, and shall make all such other reports thereof as may be required by law or by the regulations prescribed by the auditor of public accounts; and generally shall have the powers, discharge the functions, and perform the duties of a clerk of a court of record in all matters within the jurisdiction of the commission.

Duties and Powers of First Assistant Clerk.

12. That the first assistant clerk of the commission shall have the powers, discharge the functions, and perform

the duties in all matters within the jurisdiction of the commission of a deputy clerk of a court of record, and shall perform as well the duties of the clerk of the commission during the absence of said clerk, and in case of the death, resignation, incapacity, or removal from office of the clerk, he shall be the acting clerk of the commission until the vacancy in the office of clerk shall be filled.

Duties and Powers of the Bailiff.

13. That the bailiff of the commission shall, in all matters within the jurisdiction of the commission, have the powers, discharge the functions, and perform the duties of a sheriff or sergeant under the law; he shall preserve order during the public sessions of the commission, and may make arrests and serve and make return on any writ or process awarded by the commission, and execute any writ, order, or process of execution awarded upon the findings or judgments of the commission in any matter within its jurisdiction.

Duties of the Stenographer, &c.

14. The stenographer and other assistants and subordinates of the commission shall perform the duties required of them by law or by the commission, under its rules, regulations, and requirements.

The Commission to Require Its Officers to Enter into Bond; Amount, Conditions, and Recordation of Same.

15. The commission shall require its clerk, first assistant clerk, and bailiff, before entering upon the discharge of the duties of their respective offices, each to enter into bond, with surety to be approved by the commission, in such penalty as the commission may deem sufficient (not in any case less than five thousand dollars), conditioned for the faithful performance of the duties of their respective offices, and for the prompt and full accounting for and payment into the treasury of all moneys received by them, respectively, as officers of the commission. The said bonds shall be made payable to the Commonwealth, and may be

proceeded on and enforced in any circuit or corporation court in like manner as the official bonds of other officers of this Commonwealth, or of its courts. Said bonds shall be recorded in the record of the proceedings of the commission, and the original bonds transmitted by its clerk to the auditor of public accounts, who shall file and preserve the same in his office.

Powers of the Commission.

16. The commission shall have power and authority to require, by its rules, regulations, and requirements, all corporations chartered under the laws of this State, and all foreign corporations, doing business in this State, to perform and discharge any public duty or requirement imposed upon such corporations by the Constitution, or by law, and may require all such corporations to furnish such reports to the commission as may be provided by the Constitution, or by law, and the commission may enforce against any such corporation, by its judgments and processes, any fine or other penalty imposed by law for the failure of any such corporation to perform any public duty required of it, or to comply with any requirement of law, or any lawful regulation of the commission in reference to the same. The commission may require the establishment by transportation companies of separate waiting rooms at all stations, wharves, or landings for the white and colored races.

Duties of the Commission with Respect to Transportation Companies, &c.

17. It shall be the duty of the commission to make inquiry and examination from time to time into the acts and proceedings of railroad, canal, steamboat, steamship, or other transportation companies, and other chartered common carriers and transmission companies, doing business in this State, their officers and agents, for the purpose of ascertaining whether anything has been done or omitted in violation or contravention of their charters, or of the law.

The Commission to Examine all Railroads, &c.

18. The commission shall examine all the railroads and the works and equipment thereof, and the works and equipment of all other transportation companies, and keep itself informed as to their physical condition and the manner in which they are operating with reference to the security and accommodation of the public, and the compliance of the several companies with the provisions of their charters and the laws of the Commonwealth. And the provisions of this section shall apply to all railroads and other transportation companies, and to the corporations, trustees, receivers, or other persons owning or operating the same.

The Commission to give Notice to Transportation or Transmission Company of Violation of Law, and Compel Compliance with Same.

19. Whenever, in the judgment of the commission, it shall appear that any transportation or transmission company has violated any law of this State, or has neglected in any respect or particular to comply with the terms of its charter, or with the provision of any of the laws of the Commonwealth, it shall give notice thereof in writing to such company or the person operating the same same; and if the violation or neglect be continued after such notice, the commission shall take such proceedings and impose such fines or penalties within its jurisdiction as shall be necessary to compel such transportation or transmission company to comply with the terms of its charter and the provisions of the laws of the Commonwealth.

The Commission to Compel Railroad to Make Repairs When Necessary; Notice; Railroad May be Heard Thereon; Penalty.

20. Whenever in the judgment of the commission it shall appear that repairs are necessary upon any railroad, or that any addition to its rolling stock, or addition or improvement in the equipment of any other transporta-

tion line, or any enlargement of or improvement in the stations or station houses, waiting rooms, wharves or landings, or any change in the mode of operating the road, or other transportation line, and conducting its business, is reasonable and expedient in order to promote the security and accommodation of the public, it shall give ten days' notice in writing to the company or person operating the road, or other transportation line, of the improvements and changes which it adjudges to be proper, designating when and where the contemplated action in the premises will be considered and disposed of, and such company or person shall be afforded a reasonable opportunity to introduce witnesses and to be heard thereon, and any such company or person failing or refusing to obey any valid order or requirement of the commission in the premises within such reasonable time, not less than ten days, as shall be fixed in the order of the commission, it may impose upon any such company or person the fines and penalties prescribed by the Constitution and by law for its or his failure to obey the orders and requirements of the commission and the requirements of the law, and enforce the payment and collection thereof by its judgments and processes.

When Commission to Make an Examination of Road; Notice; Fines; How Same May be Enforced.

21. Upon the complaint and application of the mayor or counsel of any city or town, or the board of supervisors of any county within which any part of any transportation or transmission line is located, it shall be the duty of the commission to make an examination of the physical condition and operation thereof. Before proceeding to make such examination in accordance with such application, the commission shall give to the applicants and the corporation or person operating any such line reasonable notice in writing, of the time and place of entering upon the same. If upon such examination it shall appear to the commission that the complaint alleged

by the applicant is well founded, it shall so adjudge and shall notify such corporation or person of its adjudication; and if such corporation or person fail for sixty days after such notification to remove the cause of complaint, the commission shall impose the fines and penalties provided by the Constitution and by law for its failure to obey the orders and requirements of the commission, and enforce the collection thereof by its judgments and processes.

Commonwealth to be Complainant, &c.

22. That in all complaints, proceedings, contests, or controversies by or before the commission, whether instituted by the Commonwealth or by the commission of its own motion, the Commonwealth shall be complainant, and the party against whom the complaint is preferred, or the proceeding instituted, shall be the defendant. Any party complainant or defendant in any complaint, proceeding, contest or controversy shall be entitled to process, to convene parties, compel the attendance of witnesses, or the production of books and papers, in any proceeding or hearing before the commission.

Proceedings to be as in Courts of Record.

23. That the commission, on hearing of all complaints, proceedings, contests, or controversies, in which it shall be called upon to decide or render judgment in its capacity as a court of record, shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of this Commonwealth, in like manner as complainants and defendants in the courts of this Commonwealth.

Perjury.

24. That any person who shall wilfully swear falsely touching any material fact or matter in any complaint, proceeding, investigation, contest or controversy instituted or pending before the commission shall be deemed guilty of perjury.

The Commission to Cause its Rules of Procedure, &c., to Be Entered of Record and Printed; Distribution of Copies.

25. That the commission shall cause its rules of order and procedure to be entered upon the records of its proceedings and to be printed, as well as all amendments and additions to the same, and shall furnish copies thereof to county and city clerks and to any citizen of this State upon application therefor.

The Commission to Summon Party Before it before Imposing Fine or Penalty; Contempts; Notice to be Given as to Rules or Orders Directed Against One or More Companies; General Order, Rule, &c., to be Published; Suspension of Order During Appeal; Penalties.

26. That the commission, before entering any judgment for any fine or penalty imposed by law shall summon or rule the party upon whom such fine or penalty is sought to be imposed to appear before the commission at some public session to be designated in the process, to show cause against such fine or penalty, and why the same should not be imposed and judgment rendered therefor: provided, that the provisions of this section shall not apply to contempts committed in the presence of the commission while in public session; and before the commission shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such order, rule, regulation, or requirement shall first be given by the commission at least ten days' notice of the time and place when and where the contemplated action of the commission in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done; and before the commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any

specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published in substance, not less than once a week for four consecutive weeks, in one or more newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement made by the commission shall be published at length for the time and in the manner above specified before it shall go into effect, and shall also, as long as it remains in effect, be published in each subsequent report of the commission. Any corporation failing or refusing to obey any valid order or requirement of the commission within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission such sum, not exceeding five hundred dollars, as the commission may deem proper, or in such sum in excess of five hundred dollars as may be prescribed or authorized by law; and each day's continuance of such failure or refusal after due service upon such corporation of the order or requirement of the commission shall be a separate offense: provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties: provided, further, that the power of the commission to impose the penalties prescribed by the Constitution, or by the law, for the failure or refusal of any corporation to obey its valid orders and requirements, shall not be construed to relieve any company or corporation from the penalties now prescribed or hereafter to be prescribed by law for the failure or refusal of any such company or corporation to perform any public duty or requirement prescribed, or which may be prescribed by any law of this State, but that such pen-

alties may be enforced by the commission in addition to the penalties authorized to be imposed by the Constitution and by law for failure or refusal to obey any of its valid orders or requirements.

Powers of the Commission with Respect to Rendering and Enforcing Judgments, Penalties, &c., Collection and Payment of Same into the Treasury.

27. The commission shall have power and authority in all matters of which it has jurisdiction under the Constitution, or the laws of this Commonwealth, to render and enter up judgment for fines and penalties, or for the recovery of money, in any complaint, proceeding, contest, or controversy, whether instituted of its own motion or otherwise, and to issue process of execution thereon, which may be levied and executed in like manner as executions awarded and issued upon the judgments or decrees of the courts of law or equity of this Commonwealth. All judgments of the commission for fines or penalties, for contempt, or for the violation of any provision of the Constitution, or the laws of this State, or for the failure or refusal of any corporation to obey and observe the lawful rules, regulations, or orders of the commission, shall be entered up in favor of the Commonwealth, and when collected shall be paid by the clerk of the commission into the treasury, as hereinbefore provided.

The Commission to Have Power to Punish for Contempt by Fine or Imprisonment, &c., to the Same Extent and Manner as Courts; Commitment to Jail, &c.; Writ of Error.

28. The commission shall have powers and jurisdiction possessed and exercised under the law by the courts of record of this Commonwealth to punish for contempt by fine or imprisonment, or by both, any person duly summoned to appear and testify before the commission who shall fail or refuse to appear and testify, without a lawful excuse, or

who shall refuse to answer any proper question propounded to him by the commission in the discharge of its duty or who shall conduct himself in a rude, disrespectful, or disorderly manner before the commission, or any of them, deliberating in the discharge of duty in public session, and may, for any such contempt, impose the same penalties, either by fine or imprisonment, or by both, and render and enter up judgment in any such proceeding and enforce the same by process of execution or by commitment to jail, or by both, in the same manner and by like process and proceedings, and to the same extent, as may by law be done by any of the courts of this Commonwealth. The commission may commit any person adjudged by it guilty of contempt to the jail of any city or county in the Commonwealth, and the jailer thereof shall receive such person upon the commitment of the commission, attested by its clerk, first assistant clerk, or acting clerk, and confine such person in the jail of his city or county, as the case may be, for the term of imprisonment specified in the commitment, unless sooner discharged therefrom by due process of law. The said jailer shall receive for the board of any person so committed the same allowance made by law for other persons confined in such jail, which shall be paid out of the public treasury upon the allowance of the commission, certified as hereinbefore provided. The fines and judgments of the commission in any contempt proceeding may be reviewed, affirmed, reversed, or modified, as justice may require, on writ of error from the commission to the supreme court of appeals.

The Commission May Award and Issue, Serve, Execute and Return Process, &c., and Compel Attendance of Witnesses, &c. as Courts.

29. That the commission shall, in all matters within its jurisdiction, have the power and authority to award and issue, have served, executed, and returned, any writ, notice, process, order, or order of publication which may by law be awarded, issued, served, executed, or returned by or to

any court of law or equity in this Commonwealth, for the purpose of compelling the attendance of witnesses, the production of books and papers, the convening of parties, or the enforcement and execution of its findings, orders, or judgments.

Writs, &c., to Run in the Name of the Commonwealth; by Whom Issued and Served; Fees; Duty of Bailiff; Penalty for Failure to Execute Writ, &c.

30. That all writs, processes, and orders of the commission shall run in the name of the Commonwealth, and shall be attested by its clerk, or first assistant clerk, or acting clerk, and shall be directed to its bailiff, and may be served, executed, and returned by the said bailiff, in any city or county of this State, or by the sergeant or sheriff, or any constable, of any city or county in this State within his bailiwick. All writs, notices, processes, or orders of the commission may be served, executed, and returned in like manner and upon like persons or property as the processes, writs, notices, or orders of the courts of record of this Commonwealth, and when so served, executed, and returned shall have the same legal effect. The bailiff or other officer serving or executing any writ, notice, process, or order of the commission shall receive the same fees and commissions allowed by law for like services to the sergeants and sheriffs of the cities and counties of this State: provided, that the bailiff of the commission shall account for and pay to its clerk all fees and commissions received by him for any services which he may render, which shall be accounted for and paid by the clerk of the commission into the treasury, as hereinbefore provided. The bailiff, or any other officer hereinbefore named, who shall fail to execute and return any writ, notice, process, or order of the commission shall be subject to the penalties prescribed by law for the failure to execute and return the process of any court, which penalties may be enforced by the judgment of the commission.

The Commission to Tax and Collect Like Fees and Costs as Courts; Fees and Mileage of Witnesses.

31. That the commission shall cause to be taxed and collected in all complaints, proceedings, contests, or controversies instituted or pending before it, like fees and costs taxed and collected for like services by the officers of the courts of this Commonwealth; also, the fees and mileage of witnesses attending upon its public sessions, and may enter judgment for the same and issue execution thereon, which execution may be levied and executed in like manner as execution issued upon the judgments or decrees of the courts of law or equity of this Commonwealth: provided, that no costs shall be taxed or collected against the Commonwealth except on appeals of corporations under the provisions of section one hundred and eighty of the Constitution, which have been aggrieved by the assessments and ascertainments made by the commission under sections one hundred and seventy-six and one hundred and seventy-eight of the Constitution.

Judgments of the Commission to be a Lien on Real Estate When Duly Docketed, &c.; How Enforced; Clerks to Docket Judgments Certified by the Clerk of the Commission.

32. That the judgments of the commission for the recovery of money, fines, or penalties shall be a lien on the real estate of the judgment debtor when duly docketed and indexed in the judgment lien docket as the judgments of the courts of record are required by law to be docketed and indexed, in the county or city in which the real estate of the judgment debtor is located, and the lien of such judgment may be enforced in equity before any court having jurisdiction to enforce liens. The clerks of the courts of the several cities and counties shall docket all such judgments on the lien docket of their respective courts when a copy thereof, certified by the clerk of the commission shall be presented for that purpose.

When Sessions of the Commission Public; Judgments to be Rendered in Public Session; When Judgment Effective; Number, Time and Commencement of Session; One Regular Session Every Three Months.

33. That the sessions of the commission for the hearing of any complaint, proceeding, contest, or controversy instituted or pending before it, whether of its own motion or otherwise, shall be public, and its findings, decisions, and judgments shall be announced and rendered in public session. The judgments of the commission for fines and penalties, or for the recovery of money, shall take effect as of the date of such judgment, and when allowed by the commission in its order and entered up, the judgment shall bear interest from that date. The commission may, by its rules, provide for the number of its regular public sessions in each year, the time of their commencement, their duration, and for their adjournment; and may also provide for extra or special public sessions when, in their judgment, such extra or special public sessions may be necessary or required. The commission shall hold at least one regular public session in every three months in each year.

Appeal to Supreme Court; How Taken and Perfected; to be Heard Promptly, &c.; How Section Construed.

34. That the Commonwealth or any party aggrieved by any final finding, order, or judgment of the commission shall have, of right, regardless of the amount involved, an appeal to the supreme court of appeals, same to be taken and perfected within six months from the date of such final finding, order, or judgment, and the supreme court of appeals may, on petition of the attorney-general, or any other party so aggrieved, if said petition be presented within six months from the date of the final finding, order, or judgment of the commission, award a writ of supersedeas to any such final finding, order, or judgment, and may review, affirm, reverse, or modify the same, as justice may require, and enter therein such order as

may be right and just. All such appeals shall be taken and perfected, heard and determined, and the mandate of the supreme court of appeals certified down to the commission in the same manner as appeals in equity causes from the circuit or corporation courts of this Commonwealth to the supreme court; except such appeals shall be heard and disposed of promptly by the supreme court, irrespective of its place of session, next after *habeas corpus* and Commonwealth's cases already on the docket; provided, however, this section shall not be construed to interfere in any way with the provisions of subsections (*d*), (*e*), (*f*), and (*g*) of section one hundred and fifty-six of the Constitution, as to appeals from the action of the commission, prescribing rates, charges, or classification of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusal to approve a suspending bond, or requirig additional security thereon, or an increase thereof; but shall be construed to provide only for appeals from the final findings, orders and judgments of the commission in cases not expressly provided for by the Constitution.

Suspending Bond on Appeal; Costs, &c.

35. That the commission may require a suspending bond on any appeal, in such penalty and with such surety thereon as it may deem sufficient, and may during the pendency of any appeal, at any time, require the increase of any such bond or additional security thereon: provided, however, there shall be of right, regardless of the amount, an appeal from the action of the commission refusing to approve a suspending bond, or requiring an increase thereof, or additional security thereon, in like manner as provided by subsections (*d*), (*e*), (*f*), and (*g*) of section one hundred and fifty-six of the Constitution. The commission may also require bond for the payment of costs in such penalty, and with such security, as it may deem sufficient, in any complaint, proceeding, contest, or con-

troversy instituted or pending before it. All suspending bonds, and bonds for the payment of costs, taken or required to be taken by the commission, shall be made payable to the Commonwealth, and may be enforced in the name of the Commonwealth by motion or other legal proceeding or remedy before the commission, or in any circuit or corporation court of this Commonwealth having jurisdiction of a motion or action on such bonds, and the process and proceedings thereon shall be as provided by law upon the bonds of the like character required and taken by any court of this Commonwealth, and the commission or such circuit or corporation court may render and enter up like judgments upon such bonds as may, by law be rendered and entered upon bonds of like character, and process of execution shall issue upon such judgments, and may be levied and executed as provided by law in other cases.

Transportation Company upon Final Decision of Appeal to Refund Amount Collected Pending the Appeal in Excess of that Authorized; Penalty; Amount of Judgment Distributed Among Those Entitled Thereto.

36. That if any transportation company, upon the final decision of an appeal from the action of the commission prescribing rates, charges, or classification of traffic, confirming or modifying the action of the commission, shall fail to refund in the manner and within the time prescribed in the notice of the commission all amounts which the appealing company may have collected pending the appeal, in excess of that authorized by such final decision, upon notice to such corporation by the commission of such final decision, then the commission, after thirty days' notice to any such company, may, unless the amount required by such order be paid to the clerk of the commission, render and enter judgment in the name of the Commonwealth, for the use of the persons, firms, and corporations entitled to the same, against any such company for the aggregate amount of such collections and for costs, and may enforce the amount of such judgment and costs

by process of execution as hereinbefore provided as to the enforcement of the judgments of the commission. The commission shall, upon the collection of said judgment, forthwith distribute the amount thereof, through its clerk, among the parties entitled thereto, respectively, in such manner as it may by its rules or orders prescribe, and shall, upon the payment or collection of any such judgment, enter the same satisfied upon its records, and have the same entered satisfied on the judgment lien docket of the court of any city or county where the same may have been docketed, and the satisfaction of any such judgment shall be a bar to any further action or recovery against any such corporation to the extent of such recovery.

Accidents.

37. The commission may investigate the cause of any accident on any transportation line which, in its judgment, shall require investigation.

Transportation of Convicts and Insane Persons.

38. The commission is authorized to enter into contracts with the several railroads and other transportation companies, doing business in this State, for the transportation of convicts, insane, or other persons, who are cared for by the State, and of sheriffs and all necessary guards, to and from the penitentiary and the several State hospitals in this State, upon such terms as the commission and the several companies may agree, not to exceed two cents per mile for each person transported under such contract. Said contracts may be renewed or extended for such time as the commission shall deem to be to the interest of the State.

The Commission to Determine the Most Direct Route, Furnish Schedules, &c., to Hospitals and Penitentiary.

39. The commission shall determine the most direct and practical route from each courthouse by which to convey persons to the penitentiary and the several State

hospitals, and shall file with the auditor of public accounts, the superintendent of the penitentiary, the superintendents of the several State hospitals, and the clerks of the several counties and corporations, a schedule of the route determined upon.

The Commission to Furnish Schedule Certificates of Transportation; by Whom Signed; How Companies May Collect on Same.

40. The commission shall furnish with such schedule certificates of transportation in the form agreed upon in its contract with the companies. Said certificates shall be signed by the clerk of the commission, and shall be taken up by the conductor or other agent authorized by said companies to collect fare, as other tickets or fares are collected. They shall be presented by the companies holding the same, either monthly or quarterly, as may be determined upon by the commission and the companies, to the auditor of public accounts, who shall examine the same, and if found correct, pay them as other claims against the State are audited and settled.

The Commission to Furnish Compilation of Statute Laws, &c., Governing Common Carriers, Distribution of Same; Rules to be Posted.

41. The commission shall, annually, on the first day of January, publish a compilation of the statute laws governing common carriers in the State of Virginia, together with a compilation of the rules and regulations prescribed for their government by the commission, and shall furnish a sufficient number of copies to each railroad company or transportation company, or person operating the same, to enable such company or person operating the same to post and keep posted conspicuously in every passenger and freight depot of the company, a copy of such laws, rules and regulations; and every such company, or person operating the same, is hereby required to see that such copies, when furnished by the commission, are posted and kept posted in the manner prescribed.

Seal of the Commission; to What It May be Affixed; Its Force and Effect; Fee.

42. That the commission shall have and use a common seal, to consist of a circular die with the coat-of-arms of Virginia and the title "State Corporation Commission" stamped upon the face of the die, and shall have power to affix said seal to any paper, record, or document when necessary for the purpose of authentication, and such seal, when so affixed to any paper, record, or document emanating from the commission or its clerk's office, shall have the same force and effect for the authentication as the seal of any court of record in this State. The clerk of the commission shall collect a tax of one dollar for each impression of said seal upon any paper, record, or document, for which tax he shall account to the auditor of public accounts, and pay the same into the public treasury as hereinbefore provided.

Docket.

43. That the commission shall keep a docket of all complaints, proceedings, contests, and controversies instituted or pending before it, and all cases shall be numbered on the docket in the order in which they were instituted, and the papers therein docketed and numbered in the same consecutive order, and when finally determined and disposed of, the papers and files shall be filed and preserved in the same numerical order and properly indexed for convenient future reference.

Allowance for Expenses, &c., to be Paid Out of the Public Treasury; Compensation, Mileage, &c., of Witness.

44. The commission shall, by order entered upon the records of its proceedings, make all allowances to be paid out of the public treasury for expenses, witness fees, and mileage, and for service of process, and when so allowed and certified by its clerk to theauditor of public accounts, the last-named officer shall draw his warrant for the payment of the amount of any such allowances out of the

public treasury: provided, that the commission shall not allow to any witness exceeding one dollar per day for his attendance, nor exceeding five cents per mile for each mile traveled to and from the place of attendance, and shall not make any allowances to be paid out of the public treasury save when the expenses incurred, the witness' attendance, or the services of process, is at the instance of the commission, or on behalf of the Commonwealth.

Register of Corporation; List of Charters to be Furnished by Secretary of the Commonwealth.

45. That the commission shall have made and kept in its clerk's office a register of all corporations, which register shall contain the corporate names of all corporations heretofore chartered and existing at this date, so far as the same may be obtainable, and those hereafter chartered by the laws of this State, and of all foreign corporations heretofore or hereafter licensed to transact business in this State, and as to domestic corporations shall contain also the following information, to-wit: Date of incorporation. Names and residences of officers and directors. Amount of capital stock, and whether preferred or common, or both, and the amount of each. Amount of bonds to be issued. Nature of corporate enterprise or business to be conducted. The place of its principal or general office or place of business.

The secretary of the Commonwealth shall forthwith prepare and furnish to the commission a list of all charters recorded in his office up to April first, nineteen hundred and three, containing the above information so far as shown by the records of his office.

The Commission to Issue All Charters, &c., and to Certify Same under Its Seal to the Secretary of the Commonwealth; Recordation; Granting License to Foreign Corporations; Fees.

46. The commission shall issue all charters and all amendments, extensions, and renewal of charters, upon

application, complying with the provisions of the incorporation laws of this State, and when any charter, or amendment, extension, or renewal of charter is issued, shall certify the same, under its seal, to the secretary of the Commonwealth for recordation as required by law, and the commission shall have the granting of all licenses to foreign corporations to transact business in this State. The commission shall, before approving any application or petition for a charter, or granting any license to any foreign corporation to transact business in this State, require the payment of the fees prescribed by law, and on or before the first day of March in each year, in addition to the franchise tax and the fees otherwise prescribed by law, require each domestic corporation, other than a purely charitable institution, and each foreign corporation doing business in this State, to pay a registration fee as follows: Where the proposed maximum capital stock is fixed at fifteen thousand dollars or under, or if such corporation is organized on a mutual basis or without capital stock, five dollars; in excess of fifteen thousand dollars and not over fifty thousand dollars, ten dollars; in excess of fifty thousand dollars and not over one hundred thousand dollars, fifteen dollars; in excess of one hundred thousand dollars and not over three hundred thousand dollars, twenty dollars; and in excess of three hundred thousand dollars, twenty-five dollars; all of which fees shall be collected and received by its clerk and accounted for and paid into the public treasury as hereinbefore provided.

The Commission to Designate Depository; Deposits; Checks; Officer Collecting Judgment to Pay Same within Ten days; Penalty.

47. That the commission shall designate some State depository as a place of deposit for the moneys received by its clerk under this or any future act of the general assembly, and shall require its clerk to deposit therein all moneys received by him at least once in every twenty-

four hours, and all checks upon said depository drawn by said clerk shall be countersigned by the chairman or acting chairman of the commission. That the bailiff of the commission, or any sergeant, sheriff, or constable who shall collect any judgment, or any part thereof, rendered by the commission, shall, within ten days after such collection, pay the amount thereof, either in current funds or by certified check, to the clerk of the commission. Any officer of the commission, or any sergeant, sheriff, or constable who shall omit or fail to perform any of the requirements of this section, shall be fined not less than five hundred dollars nor more than one thousand dollars, which may be imposed and judgment rendered therefor and enforced by the commission. All proceedings against any such officer and the surety on his official bond, may be had as provided by law in reference to official bonds, for default in the accounting for, or payment over, of any moneys collected or received by him under the provisions of this act.

The Commission to Notify Corporation of the Amount of Registration Fee.

48. That the commission shall annually, on or before the first day of December, notify each corporation subject to a registration fee of the amount thereof, and when the same is payable, and when paid its clerk shall promptly receipt therefor to the corporation paying the same, such notice to be mailed to the last address furnished by such company.

Free Transportation to Members of the Commission.

49. That all transportation companies operating in this State shall, on the order of the commission, attested by its clerk, or on an order signed by any member of the commission, furnish free transportation to the members of the commission and its officers, when traveling on official business, and the order for such transportation shall show that the same is desired for official business.

Supplies, Printing, Expenses, &c.

50. That the commission shall have authority to purchase all necessary supplies, and to have all necessary printing and publishing done, and to secure all telephone and telegraph service necessary to the efficient discharge of its duties, and the same shall be paid out of the fund appropriated for its incidental and contingent expenses: provided, however, that all printing necessary for the commission shall be done by the public printer on its order.

Report of the Commission.

51. That the commission shall, on or before the first day of December in each year, tabulate and publish in statistical form such reports made to it in pursuance of the Constitution and laws of this State, as required by subsection (*a*) of section one hundred and fifty-six of the Constitution proper, and shall on the same date in each year, make report to the governor as required by subsection (*l*) of said section, to be by him laid before the general assembly at each regular session thereof.

Impeachment.

52. That any member of the commission who, during the term of his office, shall be directly or indirectly employed by, or hold any office in relation to, any transportation or transmission company, or in any wise become interested therein, financially, or shall engage in the practice of law, or be guilty of misfeasance or malfeasance in office, shall be impeached and removed from office in the same manner provided for the impeachment and removal of judges of the supreme court of appeals; and any officer of the commission for like causes, or for neglect of duty, or when, in the judgment of the commission, the public service will be promoted thereby, may be removed from office by the commission.

Board of Public Works and Railroad Commissioner to Surrender Records, Books, &c., to the Commission.

53. The board of public works and the railroad commissioner shall on the second day of March, nineteen

hundred and three, or as soon thereafter as requested by the commission, surrender and deliver to the commission the records, books, files, and papers of their respective offices, and thereafter said records, books, files, and papers shall be and remain a part of the records, books, papers and files of the commission.

Salaries.

54. That the annual salaries of the members and officers of the commission shall be as follows: Each commissioner, four thousand dollars; the clerk, two thousand dollars; the first assistant clerk, fifteen hundred dollars; the stenographer, twelve hundred dollars; and the bailiff, nine hundred dollars; and the auditor of public accounts shall draw his warrant upon the public treasury for the payment of said salaries in equal monthly payments for each month of their respective terms of office.

Not to Impair Jurisdiction of Courts; Concurrent Jurisdiction.

55. This act shall not be construed to take away or impair the jurisdiction of any court of this Commonwealth to hear and determine any proceeding, suit or motion of which it now has jurisdiction, for the enforcement of any fine or penalty against any corporation under the laws of this State, but that the powers and jurisdiction of the commission to hear, determine, and enforce such fines and penalties shall be construed to be concurrent.

Powers and Duties Vested in Commission.

56. The commission is hereby charged with all the duties and vested with all the rights, property, functions, and powers heretofore performed, vested in, and exercised by the board of public works, except in so far as the same may be in conflict with the Constitution and laws of this State, and the commission shall particularly perform the duties and exercise the powers heretofore performed and exercised by said board, prescribed in sections fifty-nine to seventy-eight, inclusive, of this act.

The Commission or Some Member to Attend the Sale of Work of Internal Improvement in which the State is Interested.

57. The commission, or some member thereof, shall, and is hereby directed and authorized to, attend the sale of any work of internal improvement in which the State is a stockholder or otherwise interested, whether such sale be made by virtue of mortgage, judgment, decree, or other lien.

When State may proceed against company by *quo warranto* and sell the works for abandonment or failure to use; deed of conveyance to be executed; collection of debts and proceeds of sale; purchaser to become corporation with privileges, &c., of old company.

58. If the works of any internal improvement company be not commenced and be completed within the time prescribed by law, or by its charter, or if after such works be completed, the company abandon them, or for three successive years cease to use and fail to keep them in good repair, in each of these cases the State may proceed against such company by writ of *quo warranto*, or information in the nature of a writ of *quo warranto*, and if in any such proceeding there is a judgment against the company, the commission shall forthwith take possession of its work and property and sell the same (except the debts owing to the company), and convey the works and property so sold to the purchaser thereof as soon as the purchase money has been paid, the deed of conveyance to be executed by the chairman of the commission under its seal. The commission shall, moreover, collect, as far as practicable, the debts aforesaid, and apply the proceeds thereof, and of the said sale, after deducting the costs and expenses of the collection and sale, to the discharge of the liabilities of the company, and whatever remains after said liabilities are discharged, pay into the treasury of the State. Upon such conveyance to the said purchaser, he shall forthwith be a corporation by any name which may be set forth

in such conveyance, or any writing signed by him and admitted to record in the county or corporation wherein the conveyance shall be admitted to record; and to the corporation thus created all the provisions of section twelve hundred and thirty-four of the Code shall apply, except that the franchises, rights, and privileges to which such corporation shall succeed and the duties which it shall perform, shall be such as would have been had or performed by the first company but for the judgment aforesaid in the proceeding by writ of *quo warranto*, or information in the nature of a writ of *quo warranto*, save only as in said section provided.

The Commission May Convey State's Interest in Road to County.

59. It shall be the duty of the commission, with the consent of the board of supervisors of any county given at any regular meeting by a two-thirds vote of all elected in such county, where in their opinion the public interest will be promoted thereby, to transfer and convey the State's interest in any turnpike or plank road, or any part thereof, to the county or counties in which said road lies. The transfer shall be made by a formal order to be entered upon the minutes of the proceedings of the commission, and a copy be transmitted by its clerk to the clerk of the circuit or county court for record in the clerk's office in each county where the said road lies.

The Commission to Collect Dividends, &c., from Work in which State is Interested.

60. The commission shall be vested with power to collect any fund or dividend due from any work of internal improvement in which the State is interested, and to pay the same into the treasury to the credit of the sinking fund.

Proxies for Stock Held by State.

61. The commission, for all works in which the State may hold stock heretofore subscribed and not disposed of, shall from time to time appoint one or more proxies to represent the stock held by or on behalf of the State in the

company having control of such work: provided, that the present proxies shall hold over until their successors are appointed.

Duty of State Proxies.

62. In cases in which it may be desired by the commission, its proxies shall cause to be transmitted to it copies of the reports of the proceedings of the directors of the companies in which they are proxies, the proceedings of the stockholders thereof, and other documents relating to the works, and shall make such reports as the commission may require or to the proxies may seem proper.

State Directors.

63. In every company to the stock of which the board of public works or the State has heretofore subscribed and which has not been disposed of, the commission shall appoint such portion of the directors as shall bear to the whole number of directors of such company the same proportion, as nearly as possible, that the stock held on behalf of the State in such company bears to the whole capital stock thereof.

When Appointed.

64. The appointment of directors in a company, according to the preceding section, shall be made by the commission before each annual meeting therein.

Terms of Directors and Proxies.

65. Proxies and directors appointed by the commission shall be in office from the time such appointment is in force until their successors are appointed, unless sooner removed. When a proxy fails to attend at any meeting, the commission, without removing him, may make a temporary appointment, to be in force during his absence.

The Commission to Keep Register of the Property of the State.

66. The commission and the second auditor shall cause to be registered, in books to be kept in their respective of-

fices for the purpose, all claims, stocks, bonds, choses in action, and all property, real or personal, due or belonging to the State, with such description thereof as will enable easy reference to the same by any State officer or person interested.

Money Recovered by Action in Circuit Court of Richmond.

67. Any money forfeited to the commission, and any money which ought to be paid into the public treasury to the credit of the fund for internal improvement, shall be recovered, with interest on such money from the time the same ought to be paid by motion, after fifteen days' notice, or by action in the circuit court of the city of Richmond. The second auditor shall institute and prosecute in the name of the Commonwealth the proceedings after an order for such motion or action shall have been made by the commission.

Agents for the Collection of Debts, &c.

68. The commission may appoint agents for the collection of its debts or claims, and authorize them to secure payment thereof on such terms as it may approve, except it shall not appoint an agent to collect any judgment, fine, or penalty rendered or imposed by the commission.

When Commission May Purchase Estate Taken Under Execution.

69. When the estate of any person taken under execution or for sale under any decree or deed of trust for any such debt or claim will not sell for the amount thereof, the commission may purchase such estate.

May Sell and Convey Any Estate so Purchased.

70. The commission may sell any estate so purchased, at such time and on such terms as the commission may deem advantageous, and the commission shall execute a deed conveying to the purchaser all the interest which the commission may have in such land.

Compensation of Agent Under This Act.

71. For the services of any agent under this act, the commission may allow compensation not exceeding in any case, five per centum on the money actually paid into the treasury.

The Commission to Fix Tolls, &c.

72. Where the tolls of any canal, navigation, or bridge company are not prescribed by its charter, the commission shall fix such tolls as may seem to it reasonable, and may alter the same at its pleasure.

Assent by Stockholders to Sec. 65 of This Act.

73. If in any company incorporated and organized before the first day of July, eighteen hundred and fifty, to the stock of which the board of public works or the State has, before or since that date, subscribed, a resolution be adopted in general meeting of the stockholders (by the vote of the majority of the stockholders, other than the State), assenting to section sixty-five of this act, the same shall thenceforth be of the same force in respect to such company that it would be if it had formed a part of the act incorporating such company. If such assent be not given, the votes in the meetings of the stockholders of such company and the appointment of directors therein shall continue to be according to the laws in force on the day before the Code of eighteen hundred and eighty-seven took effect, unless it be a company whose charter is, by the terms thereof, subject to be altered, amended, or modified by the general assembly; in which case the said section sixty-five shall be of the same force in respect to it as if such assent had been given.

Sale by James River and Kanawha Company, of Its Works, &c., to Richmond and Alleghany Railroad Company.

74. That so much of the act entitled "an act to authorize the James River and Kanawha Company to make sale

and transfer of all its works, property, and franchises to the Richmond and Alleghany Railroad Company, and to define the powers and duties of the board of public works in reference thereto," approved February twenty-seventh, eighteen hundred and seventy-nine, as has not been carried into effect, shall continue in force, and the commission shall exercise all the powers and perform all the duties conferred and imposed upon the board of public works by the said act.

The Commission to Make Report Showing Condition of Work or Company in Which State Has an Interest.

75. The commission shall make report to the general assembly at each regular session, showing the condition of each work made on the State account, or to the stock of which the board of public works or the State had heretofore subscribed, and giving such other information in relation thereto as it may deem pertinent. And the second auditor shall also report to the general assembly, at such regular session a succinct statement relative to every such work, showing the gross amount of the year's income therefrom, the net balance of such income remaining, after paying current expenses, and interest on debts due on account of the work, and what percentage, such net balance is on the capital expended. On or before the first day of October the said reports shall be delivered to the superintendent of public printing, and he shall cause the same to be printed.

76. That subsection twelve of section one hundred and eighty-three, and sections twelve hundred and twelve, twelve hundred and thirty-six, twelve hundred and thirty-nine, twelve hundred and fifty-four, twelve hundred and ninety-eight, twelve hundred and ninety-nine, thirteen hundred, as amended by an act of the general assembly, approved March fourth, nineteen hundred; thirteen hundred and one, thirteen hundred and two, thirteen hundred and three, thirteen hundred and six, thirteen hundred and seven, thirteen hundred and eight, thirteen hundred

and ten, thirteen hundred and eleven, as amended by an act of the general assembly, approved March fourth, nineteen hundred; thirteen hundred and twelve, thirteen hundred and thirteen, thirteen hundred and fourteen, thirteen hundred and fifteen, thirteen hundred and sixteen, thirteen hundred and seventeen, thirteen hundred and eighteen, thirteen hundred and nineteen, thirteen hundred and twenty, thirteen hundred and twenty-one, thirteen hundred and twenty-two, thirteen hundred and twenty-three, thirteen hundred and twenty-four, thirteen hundred and twenty-five, thirteen hundred and twenty-six, thirteen hundred and twenty-seven, thirteen hundred and twenty-eight, thirteen hundred and twenty-nine, thirteen hundred and thirty, thirteen hundred and thirty-one, thirteen hundred and thirty-two, thirteen hundred and thirty-three, and thirteen hundred and thirty-seven of the Code of eighteen hundred and eighty-seven, and sections eleven, twelve, and thirteen of the act of the general assembly of Virginia, approved March third, eighteen hundred and ninety-two, entitled an act to further regulate and control common carriers doing business in this State, and further defining the duties of the railroad commissioner in relation thereto, be, and the same are hereby, repealed.

77. This act shall be in force from its passage.

Acts of Virginia—Extra Session 1902-3-4 p. 137. Pollards Code of Va. Vol. I page 714.

Chapter IV, Secs. 3 and 70, of an Act of the legislature of Virginia, approved Jan. 18, 1904, entitled: "An Act Concerning Public Service Corporations." (Pollard's Code of 1904, Sec. 1294-d (3), (70), (Acts of Assembly of Virginia, Extra Session 1902-3-4, pages 982-985).)

"Sec. 3. If the railroad company shall after payment or tender of the lawful tolls or charges, fail, or refuse to receive, or to transport or to de-

liver in a reasonable time any property so delivered or offered, or fail to take up or set down any passenger at such depot or other regular stopping place of a train schedule(d) (?) to stop at such depot or place as he may desire, or if the said company shall demand, and receive more than is lawful it shall forfeit to the injured party a sum to be recovered by motion or action of not less than twenty-five nor more than one hundred dollars."

"Sec. 70. Any railroad company failing to comply with, or violating, or permitting any of its agents or employees to violate any of the provisions of this chapter or any valid order, rule or regulation of the State Corporation Commission, relating to the provisions of this chapter, if not otherwise provided in this chapter, shall be fined not less than ten dollars nor more than five hundred dollars for each offense."

Chapter X, Section 10, of an Act of the Legislature of Virginia approved Jan. 18, 1904, entitled "An Act Concerning Public Service Corporations," as amended by an act approved February 27, 1904—Acts of Virginia, 1904, page 78. (Pollard's Code of 1904, Sec. 1294-j (10).

"10. When different rates are not prescribed by law, the following tolls may be received on a section of five miles of a turnpike which has been completed, to-wit: Six and a quarter cents for twenty sheep or hogs, and twelve and a half cents for twenty cattle, and so in proportion for a less or greater number; three cents for a horse, mare, mule, or gelding; five cents for a two-wheeled riding carriage; twelve cents for a one horse four-wheeled riding carriage; sixteen cents for a two horse four wheeled riding carriage, and twenty cents for a four horse riding carriage and for a cart or wagon, six and a quarter cents for each animal drawing it, and for every engine, machine, wagon, or other vehicle, moved or drawn, in whole or in part, by steam or other motive power, six and a quarter cents for each wheel of every such engine, machine, wagon, or other vehicle moving on the ground. For

a fractional part of a section, tolls may be received, bearing the same proportion to the tolls for a full section that the said fractional part bears to such full section: provided, however, that the present system of giving annual tolls for travel to residents of counties traversed by pikes shall be continued and no greater charge shall be made than is now charged by turnpike companies for similar travel, and provided further, that the following rates of tolls shall be charged on the Valley turnpike, to-wit: Five cents for twenty sheep or hogs, and ten cents for twenty cattle, and so on in proportion for a greater or less number; three cents for a horse, mare, mule, or gelding; five cents for a two-wheeled riding carriage; ten cents for a four-wheeled riding carriage, drawn by two horses; six cents for a four-wheeled riding carriage drawn by one horse; and for a cart or wagon drawn by one horse, five cents; for a wagon drawn by two horses, ten cents; for a wagon drawn by four horses, eighteen cents; and for every additional horse, three cents; and for every engine, machine, wagon, or other vehicle, moved or drawn, in whole or in part, by steam or other motive power, six and a quarter cents for each wheel of every such enigne, machine, wagon, or other vehicle moving on the ground. For a fractional part of a section only such tolls may be received on any or all turnpikes as bear the same proportion to tolls for a full section that the said fractional part bears to such full section; and provided, further, that the present system of giving annual tolls for travel to residents along the Valley turnpike shall be continued, and no greater charge shall be made than is now charged by turnpike companies for similar travel."

Damages from violation of a statute, and remedy therefor, and the penalty.

Pollard's Code of Va., §2900, Vol. 2, page 1525.

"Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation,

although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages. And the damages so sustained, together with any penalty or forfeiture imposed for the violation of the statute, may be recovered in a single action of trespass on the case upon proper counts when the same person is entitled to both damages and penalty; provided, that nothing herein contained shall affect the existing statutes of limitation applicable to the foregoing causes of action respectively."

Sections 1, 44, 45, 46 and 47 of Chapter LXI of the Code of Virginia of 1873 (appearing also as sections 1185, 1233, 1234, 1235 and 1236 of the Code of Virginia of 1887).

(Chapter LXI of works of Internal Improvement, page 572).

"*To what Companies this Chapter applies.*

"1. Every company which is governed by the Act passed on the seventh day of February, eighteen hundred and seventeen, prescribing certain general regulations for the incorporation of turnpike companies, or by the Act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and every company which, after the commencement of this Act, shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the fifty-seventh chapter and in this chapter, so far as they can apply to such company without violating its charter."

* * * * * * *

Sale of Company's property under a deed of trust: what it passes: company dissolved and purchaser a corporation.

"44. If a sale be made under a deed of trust or mortgage executed by a company on all of its works and property, and there be a conveyance pursuant

thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation, by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the Court in which the conveyance shall be recorded.

Rights and liabilities of purchaser.

45. The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had or should have been performed by the first company but for such sale and conveyance; save only that the corporation so created shall not be entitled to the debts due to the first company and shall not be liable for any debts of, or claims against, the said first company which may not be expressly assumed in the contract of purchase, and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper not exceeding together the amount of stock in the first company at the time of the sale, and assign the same in a book to be kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for two weeks in a newspaper.

Old Company subject to thirty-first section of this chapter.

46. The debts due to and by, and claims against, the said first company mentioned in the preceding section, shall be subject to the provisions contained in the thirty-first section of the fifty-sixth chapter, and the said company, notwithstanding its dissolution aforesaid, shall, as to said debts and claims, have the power and perform the duties prescribed by that section.

Sales under decree of Court; Board of Public Works authorized to purchase for State: notice of sale.

47. A sale of the works and property of a company, made under decree of a court having competent jurisdiction, shall be held by the purchaser thereof, subject to all the provisions of the three preceding sections so far as the same may be applicable to such sale. The Board of Public Works shall be and are hereby authorized and directed to attend, either in person or by agent duly appointed by said Board, the sale of any work of internal improvement in which the State is a stockholder, or otherwise interested, whether such sale be made by virtue of mortgage, judgment or other lien, and that said Board be authorized to purchase, on the part and for the use of the Commonwealth, any such public work so offered for sale, if, in the judgment of said Board of Public Works, the interest of the State would be protected or promoted thereby. No sale of any work of internal improvement, in which the State is a stockholder, or otherwise interested, shall take place, whether by virtue of mortgage, trust, judgment, decree or other lien, without ninety days' notice in the principal newspapers in the city of Richmond, and in the local newspapers of the county wherein such improvement is situated, and further, without ninety days' notice served on the Board of Public Works of this State by the person or persons authorized to make the sale."

Sections 1, 19, 34 and 36 of Chapter 61 of the Code of Virginia of 1849 (said sections appearing also as Sections 1, 18, 58 and 60 of Chapter LXI of the Code of Virginia of 1873, and as Sections 1185, 1202, 1240 and 1242 of Chapter LI of the Code of Virginia of 1887). Chapter 61 of the Code of Virginia of 1849, of Works of Internal Improvement, page 313.

"*To what Companies this Chapter applies.*

Sec. 1. Every company which is governed by the act passed on the seventh day of February, eighteen hundred and seventeen, prescribing certain general regulations for the incorporation of turnpike companies, or by the act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and every company which, after the commencement of this act, shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the fifty-seventh chapter and in this chapter, so far as they can apply to such company without violating its charter."

* * * * * * *

Rates of Toll on Railroads.

"19. On a railroad on which different rates are not prescribed by law, the following rates of toll may be charged for transportation, to wit: Of a person and his baggage within a hundred and fifty pounds, not exceeding six cents per mile; of produce and other articles, except gypsum and lime, not exceeding eight cents per ton per mile; and gypsum and lime, not exceeding four cents per ton per mile. Where articles weigh less than four pounds to the cubic foot, a toll may nevertheless be charged on each cubic foot as for four pounds weight. And where the articles in any one consignment weigh less than one hundred pounds, a toll may be charged on the same as for one hundred pounds weight.

If, for the transportation of any person with his baggage, or for any consignment, the whole charge at the rates before mentioned would be less than twenty-five cents, the same may nevertheless be charged as a minimum. For the weighing, storage and delivery of articles at any depot or warehouse of the company, a charge may also be made not exceeding the ordinary warehouse rates charged in the town in which, or nearest to which, the depot or warehouse is situated.

* * * * * * *

Power of State over Companies.

34. The charter of every company, which is governed by the Act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and of every company hereafter incorporated, which shall be governed by this chapter, may be altered or modified by any future legislature as may seem to it proper, except that no law shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent, in any other cases than such as are specially provided for in this chapter.

* * * * * * *

36. When the net profits of any company hereafter incorporated which may be governed by this chapter shall be such that, but for this section, dividends might be declared out of the said profits exceeding the rate of fifteen percentum per annum on the capital stock invested, laws may be passed for reducing the tolls of the company. But no law shall reduce the tolls so as to prevent dividends of fifteen percentum per annum within thirty years from the time the first dividend of profits of the said company was declared, or so as to prevent dividends of twelve percentum per annum after the said thirty years and before fifty years from the same time, or so as to prevent dividends of ten percentum per annum after the said fifty years."

Sections 1, 18, 58 and 60, of Chapter LXI, of the Code of Virginia of 1873 (said sections appearing also as sections 1185, 1202, 1240 and 1242, of the Code of Virginia of 1887), which said sections 1, 18, 58 and 60, are as follows: (Chapter LXI, of Works of Internal Improvement, page 572.)

"*To what Companies this Chapter applies.*

Sec. 1. Every company which is governed by the act passed on the seventh day of February, eighteen hundred and seventeen, prescribing certain general regulations for the incorporation of turnpike companies, or by the act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and every company which, after the commencement of this act, shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the fifty-seventh chapter and in this chapter, so far as they can apply to such company without violating its charter."

* * * * * * *

Rates of Toll on Railroads.

"18. On a railroad on which different rates are not prescribed by law, the following rates of toll may be charged for transportation, to wit: Of a person and his baggage within a hundred and fifty pounds, not exceeding six cents per mile; of produce and other articles, except gypsum, lime, guano and other specific manures, not exceeding eight cents per ton per mile; and gypsum, lime, guano and other specific manures, not exceeding four cents per ton of twenty-two hundred and forty pounds per mile; and for the transportation of any person, or of any produce or other articles, for a distance less than ten miles, a charge may be made at the foregoing rates as for ten miles. And where articles weigh less than four pounds to the cubic foot, a toll may

nevertheless be charged on each cubic foot as for four pounds weight. And when the articles in any one consignment weigh less than one hundred pounds, a toll may be charged on the same as for one hundred pounds weight. If, for the transportation of any person with his baggage, or for any consignment, the whole charge at the rates before mentioned would be less than twenty-five cents, the same may nevertheless be charged as a minimum. For the weighing, storage and delivery of articles at any depot or warehouse of the company, a charge may also be made not exceeding the ordinary warehouse rates charged in the town in which, or nearest to which, the depot or warehouse is situated.

* * * * * * *

Power of State over Companies.

58. The charter of every company which is governed by the Act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and of every company hereafter incorporated, which shall be governed by this chapter, may be altered or modified by any future legislature as may seem to it proper, except that no law shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent, in any other cases than such as are specially provided for in this chapter.

* * * * * * *

60. When the net profits of any company hereafter incorporated which may be governed by this chapter shall be such that, but for this section, dividends might be declared out of the said profits exceeding the rate of fifteen percentum per annum on the capital stock invested, laws may be passed for reducing the tolls of the company. But no law shall reduce the tolls so as to prevent dividends of fifteen percentum per annum within thirty years from the time the first dividend of profits of the said company was declared, or so as to prevent dividends

of twelve percentum per annum after the said thirty years and before fifty years from the same time, or so as to prevent dividends of ten percentum per annum after the said fifty years."

Sections 1185, 1202, 1240, and 1242, of Chapter LI, of the Code of Virginia of 1887. (Chapter LI of Works of Internal Improvement, page 330.)

"*Sec. 1185. To what companies this chapter applies.* Every company which is governed by the act passed on the seventh day of February, eighteen hundred and seventeen, prescribing certain general regulations for the incorporation of turnpike companies, or by the act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and every company which, since the first day of July, eighteen hundred and fifty, has been, or which hereafter shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the forty-seventh chapter and in this chapter, so far as they can apply to such company without violating its charter."

* * * * * * *

"SEC. 1202. *Rates of Toll on Railroads.*—On a railroad on which different rates are not prescribed by law, the following rates of toll may be charged for transportation, to-wit: Of a person and his baggage within a hundred and fifty pounds, not exceeding six cents per mile; of produce and other articles, except gypsum, lime, guano, and other specific manures, not exceeding eight cents per ton per mile; and gypsum, lime, guano, and other specific manures, not exceeding four cents per ton of twenty-two hundred and forty pounds per mile; and for the transportation of any person, or of any produce or other articles for a distance less than ten miles, a charge may be made at the foregoing rates as for ten miles. And where articles weigh less than four pounds to the cubic foot, a toll may nevertheless be charged on each cubic foot as for four pounds

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weight. And when the articles in any one consignment weigh less than one hundred pounds a toll may be charged on the same as for one hundred pounds weight. If for the transportation of any person with his baggage, or for any consignment, the whole charge at the rates before mentioned would be less than twenty-five cents, the same may nevertheless be charged as a minimum. For the weighing, storage, and delivery of articles at any depot or warehouse of the company, a charge may also be made not exceeding the ordinary warehouse rates charged in the city or town in which, or nearest to which, the depot or warehouse is situated.

* * * * * * * *

"SEC. 1240. *Amendment or Repeal of Charters of Certain Companies.*—The charter of every company which is governed by the act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and of every company heretofore or hereafter incorporated, which shall be governed by this chapter, may be altered, modified, or repealed by any future legislature as may seem to it proper, except that no law shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent, in any other cases than such as are specially provided for in this chapter."

* * * * * * * *

"SEC. 1242. . . *Regulations as to Dividends.*—When the net profits of any company heretofore or hereafter incorporated, which may be governed by this chapter, shall be such that, but for this section, dividends might be declared out of the said profits exceeding the rate of fifteen *per centum per annum* on the capital stock invested, laws may be passed for reducing the tolls of the company. But no law shall reduce the tolls so as to prevent dividends of fifteen *per centum per annum*, within thirty years from the time the first dividend of profits of the said company

was declared, or so as to prevent dividends of twelve *per centum per annum* after the said thirty years and before fifty years from the same time, or so as to prevent dividends of ten *per centum per annum* after the said fifty years."

ACTS OF ASSEMBLY OF VIRGINIA, 1897–98.

(Page 850.)

Chap. 828. An Act to amend and re-enact section 1202 of the Code of Virginia in relation to rates of toll on railroads.

Approved March 3, 1898.

1. Be it enacted by the general assembly of Virginia, That section one thousand two hundred and two of the Code of Virginia, eighteen hundred and eighty-seven, be amended and re-enacted so as to read as follows:

§ *1202. Rates of toll on railroads.*—On a railroad on which different rates are not prescribed by law, the following rates of toll may be charged for transportation—to wit: Of a person and his baggage within a hundred and fifty pounds, not exceeding six cents per mile; of produce and other articles, except gypsum, lime, guano and other specific manures, not exceeding eight cents per ton per mile; and gypsum, lime, guano, and other specific manures, not exceeding four cents per ton of two thousand two hundred and forty pounds per mile; and for the transportation of any person, or of any produce or other articles for a distance less than ten miles, a charge may be made at the foregoing rates as for ten miles. And where articles weigh less than four pounds to the cubic foot a toll may nevertheless be charged on each cubic foot as for four pounds weight. And when the articles in any one consignment weigh less than one hundred pounds a toll may be charged on the same as for one hundred pounds weight. If for the transportation of any person with his baggage or for any consignment, the whole charge at the rates before mentioned would be less than twenty-five cents, the same may nevertheless be charged as a minimum. For

the weighing, storage, and delivery of articles at any depot or warehouse of the company, a charge may also be made not exceeding the ordinary warehouse rates charged in the city or town in which, or nearest to which, the depot or warehouse is situated. *Bicycles including the usual toolbags, but exclusive of other appendages, such as lamps, cyclometers, bells and so forth, are hereby declared to be and be deemed baggage for the purposes of this section, and shall be transported as baggage on the same terms as other baggage for passengers by railroad corporations and subject to the same liabilities, and no such passenger shall be required to crate, cover, or otherwise protect any such bicycle and appendages: provided, however, that a railroad corporation shall not be required to transport under the provisions of this act, more than one bicycle for a single person.*

2. When a passenger having the bicycles so to be transported travels on a fast express or limited train on which a bicycle cannot conveniently be transported, the bicycle may be transported on the next regular train which follows the one on which the passenger travels.

3. All acts and parts of acts in conflict with this act are hereby repealed.

4. This act shall be in force from its passage.

Extract from Section 2 (*e*), Chapter II, Act of Assembly of Virginia entitled "An Act Concerning Corporations," which became a law May 21, 1903:

> "Nothing in this act shall be construed to limit or invalidate any of the provisions of any charter now in force which has been heretofore granted to any railroad corporation by an act of the General Assembly of this State: provided, however, that if any railroad company, heretofore organized under any law of this state shall hereafter purchase, merge, or consolidate with itself any railroad competitive with it between points, both of which are within this State, then the company so purchasing, merging, or consolidating shall thereby be deemed to surrender,

and shall thereby surrender any exemption it may have under section twelve hundred and forty of the Code of Virginia, from the power of the State to change its tolls without its assent, unless said purchase, merger, or consolidation be approved by the State Corporation Commission, in which event there shall be no such surrender. Should any railroad corporation heretofore chartered by an act of the General Assembly of this State be merged into or consolidated into or be acquired by a foreign corporation in such way that the corporation of this State thereby loses its identity as a corporation of this State, then such foreign corporation so consolidating, merging, or acquiring such railroad shall, as a condition precedent to the validity of any such merger, consolidation, or acquisition, file with the State Corporation Commission an instrument in writing, attested by the seal of said foreign corporation, and the signatures of its president and secretary, acknowledging itself to be a domestic corporation of the State of Virginia as to its works, property, and franchises within the territorial limits of the said State of Virginia, and subject to its laws and the jurisdiction of its courts."

ACTS OF ASSEMBLY OF VIRGINIA, 1904.

Page 55.

"CHAP. 22.—An ACT to repeal sections 1185, 1186, 1187, and 1188, section 1189, as amended by an act approved February 20, 1892, and by an act approved January 31, 1898; sections 1190 and 1191, section 1192, as amended by an act approved February 3, 1888, and by an act approved February 28, 1890, and by an act approved March 6, 1896, and by an act approved February 26, 1900; sections 1193, 1194, and 1195, section 1196, as amended by an act approved February 3, 1888, and by an act approved February 28, 1890, and by an act approved March 5, 1896, and by an act approved February 26, 1900;

section 1197, as amended by an act approved February 2, 1892, and by an act approved February 24, 1898; sections 1198, 1199, 1200, and 1201, section 1202, as amended by an act approved March 3, 1898; sections 1203, 1204, 1207, 1213, 1215, 1216, 1217, 1218, and 1219, section 1220, as amended by an act approved December 20, 1897; sections 1221, 1222, 1223, 1225, and 1226, section 1227, as amended by an act approved March 4, 1890; sections 1228 and 1229, section 1230, as amended by an act approved February 12, 1894; sections 1231, 1232, and 1233, section 1234, as amended by an act approved February 25, 1892; sections 1235, 1237, 1240, 1241, and 1242, section 1243, as amended by an act approved February 17, 1898, and by an act approved March 2, 1900; section 1244, section 1245, as amended by an act approved February 25, 1892, and by an act approved March 3, 1898; sections 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1255, and 1256 of chapter 51 of the Code of Virginia relative to works of internal improvement."

Approved February 19, 1904.

1. Be it enacted by the general assembly of Virginia, That sections eleven hundred and eighty-five, eleven hundred and eighty-six, eleven hundred and eighty-seven, and eleven hundred and eighty-eight, section eleven hundred and eighty-nine, as amended by an act approved February twentieth, eighteen hundred and ninety-two, and by an act approved January thirty-first, eighteen hundred and ninety-eight; sections eleven hundred and ninety and eleven hundred and ninety-one, section eleven hundred and ninety-two, as amended by an act approved February third, eighteen hundred and eighty-eight, and by an act approved February twenty-eighth, eighteen hundred and ninety, and by an act approved March sixth, eighteen hundred and ninety-six, and by an act approved February twenty-sixth, nineteen hundred; sections eleven hundred and ninety-three, eleven hundred and ninety-four, and eleven

hundred and ninety-five, section eleven hundred and ninety-six, as amended by an act approved February third, eighteen hundred and eighty-eight, and by an act approved February twenty-eighth, eighteen hundred and ninety, and by an act approved March fifth, eighteen hundred and ninety-six, and by an act approved February twenty-sixth, nineteen hundred; section eleven hundred and ninety-seven, as amended by an act approved February second, eighteen hundred and ninety-two, and by an act approved February twenty-fourth, eighteen hundred and ninety-eight; sections eleven hundred and ninety-eight, eleven hundred and ninety-nine, twelve hundred and twelve hundred and one, section twelve hundred and two, as amended by an act approved March third, eighteen hundred and ninety-eight; sections twelve hundred and three, twelve hundred and four, twelve hundred and seven, twelve hundred and thirteen, twelve hundred and fifteen, twelve hundred and sixteen, twelve hundred and seventeen, twelve hundred and eighteen, and twelve hundred and nineteen, section twelve hundred and twenty, as amended by an act approved December twentieth, eighteen hundred and ninety-seven; sections twelve hundred and twenty-one, twelve hundred and twenty-two, twelve hundred and twenty-three, twelve hundred and twenty-five, and twelve hundred and twenty-six, section twelve hundred and twenty-seven, as amended by an act approved March fourth, eighteen hundred and ninety; sections twelve hundred and twenty-eight, and twelve hundred and twenty-nine, section twelve hundred and thirty, as amended by an act approved February twelfth, eighteen hundred and ninety-four; sections twelve hundred and thirty-one, twelve hundred and thirty-two, and twelve hundred and thirty-three, section twelve hundred and thirty-four, as amended by an act approved February twenty-fifth, eighteen hundred and ninety-two; sections twelve hundred and thirty-five, twelve hundred and thirty-seven, twelve hundred and forty, twelve hundred and forty-one, and twelve hundred and forty-two, section twelve hundred and forty-three,

as amended by an act approved February seventeenth, eighteen hundred and ninety-eight, and by an act approved March second, nineteen hundred; section twelve hundred and forty-four, section twelve hundred and forty-five, as amended by an act approved February twenty-fifth, eighteen hundred and ninety-two, and by an act approved March third, eighteen hundred and ninety-eight; sections twelve hundred and forty-six, twelve hundred and forty-seven, twelve hundred and forty-eight, twelve hundred and forty-nine, twelve hundred and fifty, twelve hundred and fifty-one, twelve hundred and fifty-two, twelve hundred and fifty-three, twelve hundred and fifty-five, and twelve hundred and fifty-six of chapter fifty-one of the Code of Virginia, relating to works of internal improvement, be, and the same are hereby, repealed.

2. Such repeal shall not affect or impair any act done or right established, accruing, accrued, or acquired, or any liabilty, penalty, forfeiture, or punishment incurred prior to the passage of this act, under or by virtue of any provision of the Code, or amendment thereof, or act of the general assembly, repealed by the preceding section, but the same may be asserted, enforced, prosecuted, and inflicted as fully and to the same extent as if the same had not been repealed. It being the intent hereof to preserve every right and remedy accrued or acquired, or to accrue or to be acquired, and to authorize the enforcement of every liability incurred prior to the passage of this act, under or by virtue of any provision of the Code, or amendment thereof, or act of the general assembly, referred to in the said chapter and repealed by the preceding section. All actions and proceedings, civil or criminal, commenced under or by virtue of any provision of the Code, or amendment thereof, or act of the general assembly, repealed by the preceding section, and pending at the date of the passage and approval of this act, may be prosecuted and defended to final effect in the same manner as they might under the laws then existing, unless it shall be otherwise

specially provided by law. Nothing in this act contained shall be construed to impair the charter of any corporation existing at the date of the passage and approval of this act, or any right or liability which any existing corporation, its officers, directors, stockholders, or creditors may have or be subject to, or which any corporation had, or was subject to, at the date of the passage and approval of this act, by virtue of any provision of the Code, or amendment thereof, or act of the general assembly, repealed by the preceding section. Nothing in this act contained shall be construed to impair any right or liability which any city, town, or county may have or be subject to, or which any city, town, or county had, or was subject to, at the date of the passage and approval of this act, by virtue of any provision of the Code, or amendment thereof, or act of the general assembly, repealed by the preceding section; but every such right may be prosecuted, and every such liability may be enforced, in the same manner and with like effect as if this act had not been repealed.

3. Whereas, at the last session of the general assembly an act entitled an act concerning public service corporations was passed, and became a law on the eighteenth day of January, nineteen hundred and four, which said act contained all the provisions for the regulation of said public service corporations, as amended and re-enacted, in lieu of the several sections of the Code of Virginia, of eighteen hundred and eighty-seven, by this act repealed as aforesaid; and whereas, by reason of the passage of said act concerning public service corporations there are now two sets of laws in effect in this State concerning such public service corporations, the provisions of which are not consistent the one with the other, an emergency exists, and by reason thereof, this act shall be in force from its passage.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908

ROBERT R. PRENTIS, HENRY C. STUART AND JOSEPH E. WILLARD, Individually and as constituting the STATE CORPORATION COMMISSION OF VIRGINIA, and R. T. WILSON, Clerk of the STATE CORPORATION COMMISSION OF VIRGINIA, ... Appellants

vs. No. 270.

ATLANTIC COAST LINE RAILROAD COMPANY, ... Appellee,

SAME ..... Appellants

vs. No. 271.

CHESAPEAKE & OHIO RAILWAY COMPANY, ... Appellee,

SAME ..... Appellants

vs. No. 272.

CHESAPEAKE WESTERN RAILWAY ..... Appellee,

SAME ..... Appellants

vs. No. 273.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee,

SAME ..... Appellants

vs. No. 274.

NORFOLK & WESTERN RAILWAY COMPANY, ... Appellee,

SAME ..... Appellants

vs. No. 275.

SOUTHERN RAILWAY COMPANY ..... Appellee.

Appeals from Circuit Court of the United States for the Eastern District of Virginia.

Six Cases Heard Together.

Mr. Braxton's Reply Note for Appellants

We beg to reply, first, to several matters contained in the thick, **white-covered "Supplemental Brief for Appellees on the Question of Jurisdiction,"** containing 130 pages, and, at the bottom of page 120, having the words "Washington, D. C., October, 1908." As there are more than one "Supplemental Brief", signed by the same counsel, we are unable to otherwise describe the one to which we now refer.

FIRST.

At page 2 of that brief, it is said that these records show:

"1. The enforcement of rates alleged **and admitted to be confiscatory** and **contrary to the Fourteenth Amendment** to the Constitution of the United States."

Again, at page 15, the learned counsel refer to **"an admitted case of depriving a person of his property without due process of law."**

The court's attention is called to the fact that **the only admission** upon this subject is that, for the purposes of these appeals, it is conceded that the rate referred to in the records is **below the line of reasonableness**. This is all, we are confident, that opposing counsel mean by the language above quoted.

With regard to the reduction, by a State, of the rates of a carrier, "due process of law," under the 14th Amendment, seems to apply to two (2) things,—first, the "**process**" by which the result (or reduction) is reached, and, secondly, the **result** itself.

The only **admission** in these records is as to the **result**; and that admission is only for the purposes of these cases.

Let us enlarge upon this subject a little.

The courts have held that to reduce a carrier's rates to the point of confiscatoriness, is to deprive it of its property without due process of law—but observe:

I. It has been held that under certain circumstances a carrier may **not** be entitled to remunerative rates; and

II. The holding that a carrier has not had due process, has (as a matter of fact) always been when only a legislative or administrative body has passed upon them—never where a State **judicial** body has passed upon them—in short, the denial of due process was more on account of lack of notice and hearing than on account of the actual confiscatoriness of the rate as fixed.

Is not the correct view this?

I. That to deprive a carrier of remunerative rates, where the circumstances do not justify it, is to deprive him of his property without due process, in the sense that it is an unreasonable, and therefore, illegal, exercise of the police power not permissible under the Federal Constitution;

II. As to whether the particular rate in question is a remunerative one or not, and, if not, then, whether the circumstances justify imposing an unremunerative rate on a carrier, are in themselves not only **judicial** questions, but Federal judicial questions.

Two cases then are possible:

A. Where the rate is **fixed by a legislative** or **administrative** body, without a judicial inquiry into its reasonableness:

In such case, the carrier is entitled to have the rate enjoined, upon allegation of its unreasonableness, until the question of its reasonableness **can** be inquired into and passed upon by a judicial court. The judicial question involved, however,

being a **Federal** one, the carrier has two courses available, either one of which he may elect—

(1.) He may apply to a **State Circuit** Court to enjoin the rate, appealing from unfavorable decisions, first, to the State Appellate Court, and, thence (in proper cases) to the United States Supreme Court; or

(2.) He may apply to a **Federal Circuit** Court to enjoin the rate, appealing from unfavorable decisions, first to the Circuit Court of Appeals, and thence (in proper cases), to the United States Supreme Court.

B. Where the rate is **fixed, in the first place, by a judicial** body, which at the time of, or before, prescribing the rate, **judicially considers** and decides the question of its reasonableness, it is not permissible for the carrier to have that question **again judicially considered de novo by another court, either State or Federal**; but, if the decision of the judicial body which fixed the rate, on the judicial question of its reasonableness, is unsatisfactory to the carrier, it must **appeal**, first, to the State Appellate court, and thence (in proper cases), to the United States Supreme Court.

III. But, while a carrier is deprived of its property without due process of law if subjected to unremunerative rates without justification, yet the questions whether a given rate **is** unremunerative or not, and whether the circumstances justify the ~~not, and whether the circumstances justify the~~ imposition of an unremunerative rate or not, are questions for a judicial court to decide, and, having decided them adversely to the carrier, it cannot be said to have been deprived of property without due process merely upon an allegation that the court's decision was erroneous, but, if claimed to be erroneous, such decision must be corrected by appeal and review, like any

other erroneous opinion, and cannot be ignored nor enjoined.

Thus, if an ordinary **legislative** or **administrative** body fixes a rate, without a hearing equivalent to "due process," the carrier, as above pointed out, **may** apply to a **State Circuit** Court to enjoin the rate and decide upon its reasonableness—the carrier is not **obliged** to resort to a **Federal** Circuit Court for this relief. If, however, in such a proceeding the State Circuit Court, after enjoining the rate and inquiring judicially into its reasonableness, should hold it to be reasonable and just, and, therefore, dissolve the injunction—surely, in such case, no one would claim that (unless appealed from and reversed) the carrier would not be bound by that decision, or that, ignoring it, the carrier could still charge the rate to be unreasonable and unjust and "take a second shot at it" in a Federal Circuit Court on the ground of its being unreasonable and unjust when the State Court had already held otherwise.

The same rule applies to the judgment of the State judicial court authorized to fix the rate in the first place. Conceding that a carrier cannot be subjected to an unreasonably low rate without violating its rights under the Federal Constitution, yet when a judicial court, with jurisdiction of the subject matter and the parties, has decided that a given rate is **not** unreasonably low, such must be conclusively taken to be true, until reversed upon appeal, regardless of whether such nisi prius court itself fixed the rate, or merely passed upon a rate which some other body had fixed. But,

IV. It is pointed out that rates being dependent upon circumstances, their reasonableness changes with changing circumstances and that, hence, the judicial decision that a rate is reasonable to-day, is not conclusive that it is still reasonable to-morrow, when circumstances may have changed, therefore, an independent judicial proceeding may be maintained to-morrow, at-

tacking as unreasonable, a rate which has been judicially declared to be reasonable to-day.

This is doubtless true in theory, but as a matter of fact, the reasonableness of rates does not change from day to day, though it may change from year to year, or in the course of somewhat similar periods. But irrespective of the periodicity of the change, and even though it were diurnal, yet one thing is clear and must be borne in mind, viz.: that a rate judicially determined to be reasonable to-day, must (unless reversed on appeal) forever afterwards, as to all parties to the proceeding, be conclusively considered and treated as having been reasonable **to-day**. Hence, if attacked tomorrow, or at any other time, on the ground of its alleged unreasonableness, it must, as to all parties to the present proceeding and their privies, be presumed to have been reasonable to-day, and, in such subsequent proceeding, can only be held unreasonable because of new facts or conditions **arising after** to-day (one of which **might** be the **actual** operation of the rate prescribed), so that the court could say: "Assuming the rate to have been reasonable on a given day, previous, which matter is res adjudicata as to the Commonwealth and this carrier, yet, by reason of occurrences and changes which have taken place **since** that day, this rate, which was then reasonable, has **now** become unreasonable."

Where the rate has been made by a **legislative** or **administrative** body, and its reasonableness reviewed by a court (whether State or Federal), an application to enjoin the rate, can be renewed in any court, at any time after it has been pronounced reasonable by any other court, on the ground that it has become unreasonable **since** the former decision, and though that claim might ultimately fail, yet the rate would be held up by temporary injunction in the meantime; and this process might be carried on almost indefinitely.

Thus, for instance, suppose the Federal Circuit Court, after a trial lasting many months, **should** hold the rate to be reasonable, and, thereupon, dissolve the

injunction against its enforcement. Within a month or two an application could then be made to the State Circuit Court of A. County to again enjoin the enforcement of the rate on the ground that by reason of new facts and circumstances, it has become unreasonable since the Federal Court's decision. The judge of the new court being wholly unfamiliar with the facts of the case or what had developed in the former hearing by the Federal Court, grants the injunction, and after a hearing lasting several months, during which the rate is held up, this second court holds that no facts have been introduced since the hearing by the first Court to make the rate unreasonable, and, thereupon, dissolves its injunction.

In a few months more, application is made to the State Circuit Court of B. County to enjoin the same rate on the ground that, because of occurrences since the decision by the State Court of A. County, the rate has become unreasonable. The Judge of B. County, being wholly ignorant of the facts of the case and of what had developed before the Court of A. County or the Federal Circuit Court, enjoins the rate a third time, until the allegations of the bill may be inquired into; and after several months of taking testimony, making reports of masters, &c., &c., that Court also decides against the plaintiff and dissolves the injunction; whereupon, in a few months more the same proceedings are repeated in the Courts of C., D., and E. Counties and others.

All this can be done under the old machinery for making rates by one body and testing the validity in another; because when a bill, attacking the validity of a rate not made by the Court itself, is not sustained by overthrowing the rate, the whole proceeding is dismissed from the Court and, on allegation of changed circumstances, the carrier is at liberty to take the matter into another court, which, until the evidence is in, is entirely unfamiliar with what had been developed or has transpired in the previous hearings.

Under the proceedings before the Virginia State

Corporation Commission, however, the case is different. That tribunal being a **court,** and the order fixing the rate being in the nature of a **continuing injunction,** the proceeding in which the rate is fixed may be continued in the same tribunal with right to apply at any future time for a modification of the order, in view of subsequently occurring facts or changing circumstances. Such was done in the cases involved in these appeals—see the order of the Commission Rec. p. 129, 130, & 131, & seq.

The action of the Commission upon such subsequent application for a modification of its rate order, is, of course, subject to review upon appeal just as was its action in originally fixing the rate; but, in the first place any unseemly "cross-firing" of independent, coordinate courts is avoided; and, in the second place, the familiarity of the Commission with the developments in the previous considerations of the rate, and its possession of, and accessibility to, the previous record, enable it to act much more intelligently, promptly and justly, than could a strange Court entirely unfamiliar with the matter.

SECOND.

At page 31 of the "Supplemental Brief" mentioned at the beginning of this note, after quoting from Commonwealth v. A. C. L. R. Co., 106 Va. 61, our opponents say,—

"So that the fixing of rates by the Commission, **after notice and hearing,** is held by the highest court of Virginia to be a legislative act."

That this statement is entirely too limited is, we submit, apparent from the three sentences following the language quoted in opponents' brief.

The court said of the Virginia Commission:

"But, in the exercise of this legislative power, it cannot make its rates effective, or put its regulations into force, until it has summoned the company or companies, to be affected, before it. This is done by notice, which affords due process of law to the company. **The hearing or investigation upon that**

notice gives to the final action of the Commission the force and effect of a judgment of a judicial tribunal. Passing upon the reasonableness of rates and classifications to be prescribed by it, and of regulations, orders and requirements to be promulgated by it—in the exercise of its legislative authority—constitute the principal matters 'within the jurisdiction' of the Commission (as a judicial tribunal) as outlined by the Constitution."

Commonwealth v. A. C. L. R. Co., 106 Va. 61.

THIRD.

At page 39 of that Brief, a chapter commences, entitled,—

"The Constitution of Virginia has nowhere attempted to make the Commission of that State a court while engaged in the act of rate-making, or in the hearing preparatory to rate-making."

(1)—One of the grounds on which our opponents rest this contention is the language quoted from the opinion in A. C. L. R. Co. v. Commonwealth, 102 Va. 621.

In that case, a number of Railroad Companies undertook to get the court to say that twenty (20) demurrage rules were invalid, because they would necessarily regulate inter-state commerce.

The sole point in contemplation of the court, when the language referred to by opponents was used, was, whether or not the Demurrage Rules in question (or any of them) could be legally applied to inter-state commerce; and it was only with reference to this that the court said such a question should be decided only in a concrete case, in which it might be sought to actually apply said rules (or any of them) to inter-state commerce.

The briefs filed for the Commonwealth in that case will show that the Commonwealth insisted, at great length, that it was utterly impossible for the court to determine, in that case, the question above referred to—that it would be absolutely necessary to wait until the question of the validity of one or more of said rules (as applied to inter-state commerce) was presented in a concrete case.

This was the view the court took. At page 614, (102 Va.) the court said:

> "To draw the line between the two fields of jurisdiction, and to define and declare when a State regulation is an unconstitutional encroachment upon Federal power, is often a question very difficult to solve, **even in a concrete case,** but that difficulty is greatly increased and rendered well-nigh impossible when a court is called upon to **pass upon a body of rules and regulations,** like those now under consideration, and to declare whether or not they, or any of them, in their operation, will directly intrench upon the authority of the United States, or violate some right protected by the Federal Constitution."

At page 618, the court said:

> "**It is impossible for us, on this appeal, to make a wholesale exposition of the constitutionality of the rules and regulations in question.**"

At page 619, the court said:

> "For these and other reasons which might be given, we are of opinion that **we ought not, upon this appeal, to attempt to decide** to what extent, if at all, the said rules and regulations, in their operation, may directly infringe upon the commerce clause of the Constitution of the United States, or violate any right of the appellants under that instrument, and that **the decision of of those questions can only be properly made as they arise in concrete cases, and upon the particular facts of each case.**"

What the court meant by its opinion in the case above-mentioned is explained by it in the later case of Southern R. Co. v. Commonwealth, 107 Va. 771. In that case, the Virginia State Corporation Commission had imposed a fine upon the Southern Rwy. Co. for violating one of the demurrage rules above referred to. On the appeal from this fine, the court quoted from the case in 102 Va., above-mentioned, and said:

"**A concrete case** is presented on this appeal."

Thereupon, the court adjudged the demurrage rule, therein complained of, to be void, so far as it applied to inter-state commerce.

In refusing to pass upon the validity (as applied to inter-state commerce) of the demurrage rules, as a body, the court, in the case in 102 Va. (supra), merely followed the precedent of this Court in the Railroad Commission Cases, 116 U. S. 335, where it said:

> "The line between the exclusive power of Congress, and the general powers of the State in this particular, is not everywhere distinctly marked, and it is always easier to determine **when a case arises** whether it falls on one side or the other, than to settle **in advance** the boundary, so that it may be in all respects strictly accurate."

(2)—But the contention that the Virginia Commission is not "a court while engaged in the act of rate-making, or in the hearing preparatory to rate-making", is conclusively answered by the following language of the Supreme Court of Appeals of that State:

> "The Constitution of Virginia, in Section 156e, provides, as to the Commission, that 'in all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record', &c. This section gives the Commission, in the exercise of its judicial functions authority to administer oaths, compel the attendance of witnesses, enter up and enforce its judgments, and confers upon it other ordinary attributes of a court of general jurisdiction. In all matters 'within the jurisdiction of the Commission', says the Constitution, employing the word **jurisdiction** which is appropriately used with reference to a **judicial** tribunal as distinguished from legislative or administrative authority. The

Commission, by Section 156b, has conferred upon it the legislative **authority to fix and prescribe rates** and classifications, and to make regulations for transportation and transmission companies to the full extent to which that power exists in the State government. But in the exercise of this legislative power it cannot make its rates effective or put its regulations into force until it has summoned the company or companies to be affected before it. This is done by notice which **affords due process of law** to the company. **The hearing or investigation upon that notice gives to the final action of the Commission the force and effect of a judgment of a judicial tribunal. Passing upon the reasonableness of rates and classifications to be prescribed by it** and of regulations, orders and requirements **to be** promulgated by it—in the exercise of its legislative authority—**constitute the principal matters 'within the jurisdiction' of the Commission (as a judicial tribunal)** as outlined by the Constitution."

Commonwealth vs. Atlantic Coast Line R. Co., 106 Va. 61.

That this Court will, in these cases, accept the foregoing construction of the Virginia Constitution, is a proposition too often announced to require citation of authority.

And this quotation, furthermore, it is submitted, disposes of the contention, at the top of page 51 of that brief, that the reasonableness of the rate, here involved, is not **res adjudicata.**

FOURTH.

At pages 62-65 of that brief, the objection is made that, although, while an order of the Commission is suspended, "no case based upon or involving" that order "shall be heard, or disposed of, against the objection of either party", yet the carrier may **still be sued,** and will be put to the trouble of interposing, in any such suit, a plea that the order of the Commission has been suspended.

(1) Is not the same thing necessary in the case of a person who has been adjudicated a bankrupt?

Is it possible that, under any conceivable circumstances, a carrier may not be sued, and a judgment gotten against it, unless some kind of plea or defense is interposed?

Is it not true that, at any time, anybody in the world may institute as many suits as he pleases against anybody he pleases, and that the defendant, or some one for him, must defend the suits either before or after judgment?

If a law were enjoined by a Federal Circuit Court, there would be no possible way to prevent people from **instituting** suits against the carrier, and certain it is that some action would have to be taken concerning such suits, either before or after judgment. Nevertheless, the carrier would still be liable to be "vexed" by the **institution** of suits.

Of course, the court, in which the suits are instituted, will not, sua sponte, interpose a defense.

(2) The court's attention is furthermore called to the fact that, if the regulation, prescribed by the Commission, is suspended, pending appeal, by execution of the bond, etc., permitted by the Virginia Constitution, **no penalties or rights of action** can accrue until the appeal is disposed of. And, should the appeal be decided against the carrier, yet its only liability, up to that time, would be on the supersedeas bond which it executed, viz: to "refund" all amounts collected, pending the appeal, in excess of the rate approved by the appellate court.

FIFTH.

At page 111 of that brief, speaking of "due process of law" by a tribunal exercising executive, legislative and judicial powers in respect to the same matter, our opponents say:

> "So far as we are informed, there is one case, and one case only, in which the question has directly arisen."

The case to which they refer is Western Union Tel. Co. vs. Myatt, 98 Fed. 341, which is mentioned at page 171 of my principal Note of Argument.

Our opponents overlook the case of Winchester &c. R. Co. vs. Commonwealth, 106 Va. 265, in which the five judges of the Virginia court announce a view exactly contrary to that expressed by the judge who decided the case in 98 Federal.

The court will find an extended quotation from the Virginia case in the Appendix to the Brief filed herein by the Attorney-General of Virginia.

SIXTH.

Our opponents, at page 107, of said Brief, cite **Dr. Bonham's Case,** 8 Coke, 118. In that case, Lord Coke merely said that **the man who, under the law, was entitled "to have a moiety of the forfeiture",** could not also be the Judge to impose said forfeiture. A judgment entered up by such a Judge could be avoided because **in fraudem legis.**

Of course, neither Dr. Bonham's case, nor any other case similar thereto, can have the slightest bearing upon the questions involved in these appeals.

SEVENTH.

The Virginia Commission has been enjoined from proceeding (as a judicial court to enforce its order prescribing rates. Should any citizen institute, before the Commission as a court, any proceeding to cause a penalty to be imposed upon any one of the Appellees for non-compliance with the law reducing its rates, **that court** (and counsel for Appellees conceded that it is **then** a court, and is **then** performing solely a judicial function, —and see Commonwealth v. A. C. L. R. Co., 106 Va. 61.)—we say **that court** cannot, under these injunctions, proceed with or consider such prosecution.

In **Ex Parte Young,** 209 U. S. 163, Mr. Justice Peckham says:

> "It is proper to add that the right to enjoin an individual, even though a State official, from commencing suits under circumstances already stated, does not include the power to restrain a **court**

from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and **an injunction against a State court would be a violation of the whole scheme of our government.** If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.

"The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former."

In this connection, see my former Note for Appellants, pp. 118 and 154 et seq.

REPLY TO MR. STONE'S NOTE.

The only point made in Mr. Stone's Note for the Louisville and Nashville Railroad is that the **classification** of roads, made by the State Corporation Commission in their order of April 27th, 1907 (Rec. p. 129 & seq.), was illegal.

To this point the following answers are respectfully submitted:

(1)—The right to prescribe rates for railroads or other highways or carriers **carries with it, by necessary implication, the right to classify** the highways or carriers, and to make rates for each class.

Chicago, &c., Co. vs. Iowa, 94 U. S. 164;
Dow vs. Beidelman, 125 U. S. 680-691;
Chicago, &c., Co. vs. Wellman, 143 U. S. 339;
Covington, &c., Co. vs. Sanford, 164 U. S. 578, 597-8.

(2)—Under the Constitution of Virginia, the **entire power of the State** in the matter of rate-making is **conferred upon the State Corporation Commission,** subject to appeal to the Supreme Court of Appeals.

Va. Const., Sec. 156, Sub-sec. (a), Rec. p. 84.

(3)—If, then, the Commission had the right to make **any** classification, the question whether the classification actually made is a reasonable and valid one, is a matter of "**error**" and not of "**jurisdiction**", to be reviewed and corrected (if at all) by **appeal,** and not by **injunction.**

(4)—The particular classification, involved in these appeals is not even "erroneous", but is reasonable and fair.—See the opinion of the Commission, Rec. pp. 154-5, 161-2 and seq.

REPLY TO MR. WICKHAM'S NOTE.

Of the two papers entitled "Supplemental Brief for Appellees", filed in these causes, the smaller one is here referred to as "Mr. Wickham's Note."

The single point made in this note is the effect of the rates, involved here, upon **Interstate Commerce.**

On this point, attention is respectfully invited to what I have already said on the subject in Chapter IV, pages 21 and seq., of my principal note. In addition to what is said there, the Court's attention is invited to only the following:

(1)—If **every intra-state rate** necessarily, and as a matter of law, so affects and controls inter-state commerce as to amount to an unconstitutional regulation of the latter, then, of course, the supposed power of a State to regulate intra-state commerce does not, in fact, exist, and, consequently, any tribunal or agency set up by the State (regardless of its nature, and whether it be legislative, judicial or executive, or any combination of those classes) must be an illegal tribunal and all of its acts mere nullities, as much so as if it had been created by the State to prescribe and enforce duties upon imports.

In such case, no one would deny the jurisdiction of a Federal, or any other, court to enjoin the acting, or the enforcement of the acts, of such a tribunal.

In Chapter IV of my principal note, I have pointed out that **all** intra-state rates are certainly not so related to inter-state rates as to be beyond the power of the State—if they are, then, of course, appellants must lose these appeals, the State Corporation Commission, whose acts were enjoined, being, in such case, wholly without jurisdiction in the premises.

It is respectfully submitted that what was set forth in said Chapter IV not only refuted the claim that **all** intra-state rates so controlled inter-state rates, but demonstrated that **not any intra-state** rates necessarily so controlled inter-state rates as to take the former out of the power of the State to regulate.

(2)—Conceding for argument, however, but only for argument, that there may be circumstances under which a particular intra-state rate so controls inter-state rates as to be beyond the power of the State to regulate, yet surely the question as to whether those circumstances really exist in a particular case is a question to be decided by the court—the Corporation Commission—in fixing the rate, and a wrongful decision of it would be a matter of "**error**" and not of "**jurisdiction**".

In these very cases, this particular point was distinctly made by the carriers in their Answers before the Commission (Rec. p. 60), and expressly decided against them by that court.—Rec. p. 137. Even though this decision be erroneous, it would not affect the jurisdiction of the Commission.

Appellees seem laboring under the impression that **only Federal courts have jurisdiction of Federal questions**. Of course such is not the case, and it is unnecessary to cite authorities to show that State courts have full and exclusive jurisdiction (subject to ultimate appeal to this Court) of all Federal questions arising in proceedings before them.

Appellees seem also under the impression that, should a **State court erroneously decide** a Federal question involved in its proceedings, then a Federal Circuit Court can at once **intervene by injunction,** brush aside the proceedings in the State court, and itself take charge of the controversy.

Appellees, of course, do not state their position this way, but it is respectfully submitted that such is the unavoidable logic of much of their argument, especially of that part dealing with inter-state commerce.

We respectfully submit that, if it be conceded that **some** intra-

state rates, under **some** conditions, might not illegally affect or control inter-state commerce, that **some** rates fixed by the State might not be unreasonably low, and that **some** railroads might not (by virtue of contract obligations) be immune from State regulation, then the question as to whether the particular rates involved here do infringe upon inter-state commerce or are unreasonably low, or as to whether the particular carriers involved here are contractually beyond the State's power of regulation, are all **questions on the merits, and, therefore, cannot concern these appeals,** which involve only questions of jurisdiction. For, if the State Corporation Commission had jurisdiction to consider and pass upon those questions by "due process of law", then its erroneous decision of them cannot justify the interposition of a Federal Circuit Court, to which the statute has given **only "concurrent jurisdiction"** with the State courts in Federal questions—the correction must be **by "appeal" only.**

IN CONCLUSION.

In the cases involved here, the lower court (as, apparently, it was bound to do, if it had jurisdiction in these cases at all,) decreed costs against the individual members and the Clerk of the Commission.

There were six of these cases, and the court was not obliged to hear them all together, but could have heard each case separately. It was estimated by those most familiar with the facts that the full record of evidence, oral and written, taken by the Corporation Commission in the hearing of these cases, would amount to some fifteen or twenty thousand pages, a large part of which would have been necessarily repeated before the Federal Circuit Court in each of these cases, and, **all** of it, if all six cases were heard at once. Thus, it will be seen that the court costs which **might** have been decreed against the Clerk and individual members of the Commission would easily aggregate possibly $50,000 or more if they had contested the cases on their merits. In case of appeals, the cost would have been much more, and, when to this is added even the most reasonable attorneys' fees for necessary counsel to represent them, it is apparent that, in these proceedings, if the defendants had made a contest on the merits, and the cases had been appealed by

either side, these public officers, in their private and individual capacities, would have incurred the risk of at least $100,000 of personal liability—and that, too, for merely performing, to the best of their ability, the imperative duties of their office.

State Railroad Commissioners are required by law to fix rates; but, under the working of former rate-making machinery, they could only do so at the peril of financial ruin and bankruptcy for themselves. For, if, on a difficult, intricate and complicated matter, not susceptible of absolute determination, but depending in the highest degree, upon personal judgment and opinion, as is the question of the reasonableness or unreasonableness of a given rate—if, in such a matter, the single judge of the reviewing court—whether State or Federal—should entertain a different view from the Commissioners, the latter would have to personally pay, or be decreed against for, thousands, and probably tens of thousands, of dollars of costs and expenses.

Nor is this the worst aspect of the case. The Clerk of the Commission (who is doubtless a necessary party to the injunction proceedings, if they are to be sustained at all) has nothing to do with **making** the rates, and is absolutely without authority or control over the Commission as to what rates that body may make; yet this same Clerk is made jointly and separately liable with the Commissioners for all these enormous and ruinous costs.

Nay, more than this—the Commissioners who are sued may not be the ones who made the rates.

One defendant Commissioner may have voted against the rates when made; yet, he must none-the-less expose himself to liability for all the costs of proceedings to enjoin them.

The Commissioners who made the rates may no longer be members of the Commission—if so, they cannot be sued. The present members of the Commission (who must be the ones sued if an injunction suit is to be maintained) may have had nothing to do with making the rates complained of, no application may have been made to them for a modification of the rates, and they may have had no opportunity to investigate the matter for themselves (in consequence of which investigation they might have voluntarily increased the rates), yet, notwithstanding all

this, they are the only persons to be sued, and must risk bankruptcy for themselves in costs, abandon the interests which it is their sworn duty as public officers to protect, or else resign!

This is not a mere idle theory, but a gruesome fact.

In these very cases, in which are decrees against them for costs, larger in all probability than the entire estate of either of them, Mr. Wilson, as Clerk of the Commission, had absolutely no authority or control over the rates or any other matter complained of, and Judge Prentis became a member of the Commission after the entry of the order prescribing the rates complained of. Judge Crump, however, whom Judge Prentis succeeded, and who was Chairman of the Commission when the rates were made, having ceased to be a member of the Commission, is no longer a proper party to these suits, and is, therefore, not responsible for any of the costs.

As illogical as this state of affairs may be, in which, apparently, a litigation may be maintained against "an office", the brunt of which shall shift to the personal responsibility of the successive incumbents, leaving those in office at the date of final decree to risk payment of the entire costs—as illogical as this may be, it is apparently the unavoidable result of the cumbersome and impracticable machinery for rate-making which the Virginia Corporation Commission was designed to replace.

In the recent case of Ex Parte Young, this Court very justly observed that it would be impossible for a carrier to obtain servants to fill its offices where, in the performance of their duties, they would be exposing themselves to personal liability for heavy penalties.

It is respectfully suggested that, true and just as this observation is, when applied to the carrier, it is equally true and just when applied to the State which may find it equally impossible to obtain servants to fill its offices in connection with the regulation of railroads, where, in the faithful and conscientious performance of their sworn duties to the State, they expose themselves to ruinous costs, in being personally sued, not only for their own acts, but for the acts of other officers over whom they have no control (as in the case of the Clerk of the Commission), and for those of their colleagues or predecessors.

As this honorable court pointed out, in Young's case, it is im-

material that the **carrier** would probably pay the **fines adjudged** against its officers; and, it is respectfully submitted, it is equally immaterial that the **State** would probably pay the costs decreed against **its** officers—the argumentum ab inconvenienti is as strong in the case of the State and its officers as in that of the carrier and its officers.

Under the old machinery—that which is contended for by Appellees here—where the reasonableness of a rate can only be judicially tested by personal injunction suits against the State's officers, it is not perceived how the foregoing difficulties can be avoided; but, under the rate-making machinery established by the Virginia Constitution, the validity of which, having been repeatedly confirmed by the highest court of that State, is now to be passed upon by this honorable court—under the working of this new rate-making machinery, none of these untoward results could by possibility occur.

> (1)—No officer of the **carrier** (nor the carrier itself) would risk liability for **penalties** while the validity of the rate is being judicially determined, because, by supersedeas, **the operation of the rate may be suspended until its validity is finally settled;**
>
> (2)—No officer of the **State** would risk liability for any **costs** in litigation in which he has no personal concern, and which is brought merely to test the validity of a rate, because the decision of the Commission on that question is reviewable only in the orderly, natural, familiar, prompt and efficient method of **appeal**—a proceeding in which the Commissioners and the Clerk are no more personally involved than are the judge and clerk of an ordinary nisi prius court, in an appeal from one of its decisions.

One word more:

The carriers have long complained bitterly because a State legislature or legislative Commission fixes rates without previous full investigation, the failure to make which, or give the

carrier a hearing before prescribing a rate, has been a just subject of animadversion by the courts.

In no particular is the Virginia rate-making machinery more emphatic, clear and effective than in those provisions securing to the carrier the fullest investigation and hearing possible upon the reasonableness of a rate, as well as upon its expediency, before it is prescribed; and, in the cases involved in these appeals, almost a year was spent, and some ten or twenty thousand pages of evidence were taken, in an investigation which has been justly referred to as "**perhaps the most extensive and exhaustive in its scope of any yet undertaken by rate-making bodies.**"—Rec. p. 143.

To what purpose, however, was spent all the time, labor and money involved in this elaborate investigation, if it is all to go for naught, and the reasonableness of the rate be reviewed and its validity tested, not upon the evidence upon which the rate was made, but, upon entirely independent evidence, taken all over again, by an independent tribunal, in what may be called a collateral proceeding, and taken as of a different and subsequent date?

The abuse of holding back evidence before the Commission and then introducing it for the first time in the reviewing court, was noticed and condemned by Mr. Justice Shiras in the **Social Circle** case, ten or fifteen years ago (162 U. S. 196), but, as he also stated, the carrier could not be **legally** restricted by the evidence before the Commission in an independent proceeding on injunction in a court.

In the cases involved in these appeals, the hearing before the Commission was not concluded until the **carriers 'announced their cases were complete' and that they 'had nothing more to say or offer in their behalf'**—Rec. p. 73 and 76. To what purpose, should all this vast amount of evidence be **all taken over again** by the Federal Circuit Court, instead of using it in the form in which it was taken, and considered, by the Commission?

On an appeal to the State Supreme Court of Appeals, this record, already made up and ready for certification (Rec. p. 119-120), would have been **at once submitted** to that tribunal for review—the Virginia law giving such appeals precedence over all other, but criminal, cases—Va. Const., Sec. 156, sub-sec. (e), Rec.

p. 88;—but in the injunction proceedings involved here, this enormous record, the result of a year's patient and laborious toil, would have gone for nothing, the case would have stood exactly as would that of a rate which had been made arbitrarily and capriciously without any investigation at all, and all this evidence would have had to be taken over again de novo, entailing necessarily the delay of another year and the expense of many thousands of dollars, chargeable as costs to the members and Clerk of the Commission in their individual and private capacities.

Can it be that this was essential for the preservation of the carriers' rights?

Respectfully submitted.

A. CAPERTON BRAXTON,
Of Counsel for Appellants.

Richmond, Va.,
Oct. 10, 1908.

Office Supreme Court, U.
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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

The Virginia Corporation Commission Cases.

No. 270.

ROBERT R. PRENTIS, HENRY C. STUART, AND JOSEPH E. WILLARD, CONSTITUTING THE STATE CORPORATION COMMISSION OF VIRGINIA, AND R. T. WILSON, CLERK THEREOF ..... *Appellants*

versus

ATLANTIC COAST LINE RAILROAD CO. ..... *Appellee*

No. 271.

SAME ..... *Appellants*

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY. ... *Appellee*

No. 272.

SAME ..... *Appellants*

versus

CHESAPEAKE WESTERN RAILWAY COMPANY ..... *Appellee*

No. 273.

SAME ..... *Appellants*

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY ... *Appellee*

No. 274.

SAME ..... *Appellants*

versus

NORFOLK AND WESTERN RAILWAY COMPANY ..... *Appellee*

No. 275.

SAME ..... *Appellants*

versus

SOUTHERN RAILWAY COMPANY ..... *Appellee*

FINAL REPLY BRIEF FOR APPELLANTS.

Supreme Court of the United States.

The Virginia Corporation Commission Cases.

R. R. PRENTIS, &C., CONSTITUTING THE VIRGINIA STATE CORPORATION COMMISSION,

Appellants.

No. 270. vs.

THE ATLANTIC COAST LINE R. R. CO.,

Appellee.

and five other cases heard therewith, Nos. 271, 272, 273, 274 and 275. October Term., 1908.

FINAL REPLY BRIEF FOR THE APPELLANTS.

The latest "Reply Brief" of counsel for appellees reached me to-day. Its points are either not essential to the decision of this case, or they have been already fully met in the printed briefs filed for appellants.

This discussion, protracted as it has been, but none too full for the momentous issues involved, has made manifest the vital issue upon which any right decision of this case must turn, and that will be now briefly considered.

The following is the crucial question in the case as evolved by the oral and printed arguments.

Can the reasonableness and justness of a rate be judicially inquired into, and judicially and validly determined, *at the time* of the fixing of the rate by a tribunal charged with the duty and power of judicially determining what rate is just and reasonable and thereupon prescribing the same: or must such judicial inquiry and determination as to the justness and reasonableness of such rate be had *subsequently* to the adoption of the rate, in order to make such judicial determination and adjudication binding upon the State and the common carrier?

Since *Chicago, Milwaukee and St. Paul R. R. Co. vs. Minnesota,* 134 U. S., 418, it has been the settled rule of American law, that the carrier is entitled to a judicial inquiry, and a judicial determination as to the justness and reasonableness of a prescribed rate.

As no such inquiry and adjudication had been accorded him in that case, or in any of the cases which have been subsequently decided, this Court has uniformly held in those cases, that the carrier was entitled to such judicial inquiry and determination *after the* rates were prescribed.

This was a necessary consequence from the circumstance that no such inquiry and adjudication had in those cases been accorded to the carrier at any time.

Surely it can not be inferred from this, that where a judicial inquiry and due process of law, and a careful and exhaustive judicial investigation and adjudication as to the justness and reasonableness of the prescribed rates have already been accorded to, and fully availed of by the carrier, he will be entitled to and will be given another judicial inquiry and determination of those matters in some other Court in a suit brought to

collaterally attack and stay the finding and judgment of the tribunal in which such matters have been already adjudicated?

Will it be for a moment claimed, that the only time at which such judicial inquiry and determination can be validly had is *after* the rate has been prescribed?

On the contrary, is it not manifestly true that the proper and the logical time at which those matters should be judicially inquired into and determined, is the time when the rates are being determined and prescribed?

It is impossible to conceive of any reason which will address itself to the human mind which would suggest that the logical or the psychological moment for the proper determination of the justness and reasonableness, and propriety of a rate is not the very time when such rate is being prescribed.

This is the precise course of procedure which has been adopted by Virginia, and which was followed in these cases to final judgment by the Court which she has established for this purpose.

Distinctly, since March 24, 1890, when *Chicago, Milwaukee and St. Paul R. R. Co.* vs. *Minnesota* was decided, indeed since the decision of the Railroad Commission cases on the 4th of January, 1886, proceedings for fixing the rates of common carriers have been assimilated by the decisions of this Court to proceedings for the taking of property by a State for public uses in the exercise of the power of eminent domain, and the doctrines applicable to proceedings for the taking of private property for public uses have been applied to proceedings for the fixing of rates.

Now in *ad quod damnum* or other proceedings for the taking of private property for public uses, the rule has been and is now in all jurisdictions of which we know anything, to ascer-

tain what is the fair compensation to be made to the owner, not at some time subsequent to such taking, but at the very time of the taking.

If this is a just and valid rule as to fixing the fair compensation to be made for property taken in the exercise of eminent domain, can human invention suggest any reason why ~~the time at which~~ the justness and reasonableness of the rates of a common carrier for transportation of passengers or goods ought not to be judicially determined at the very time those rates are prescribed?

Ad quod damnum proceedings also furnish us a complete answer to a point which has been mainly relied upon by opposing counsel, namely, that, if this Court shall sustain the validity of the Virginia Corporation Commission as a Court, and of the jurisdiction conferred upon that commission by the Constitution and laws of the Commonwealth, then the appellees and others in like position with them will be denied access to the United States Circuit Courts for redress against confiscatory or otherwise invalid exercise of its power by said commission.

We insist that this contention is based upon a misapprehension of the relations of the U. S. Circuit Courts and of the State tribunal to this subject.

All proceedings for the taking of private property for the public uses of a State, in the exercise of eminent domain, are begun, continued, and ended in the State courts, and must be so begun and conducted, for the reason that no Federal tribunal has or could be given the right to administer this power, which is peculiarly an attribute of the sovereignty of the State. Nor can it be claimed that the judgment of a State court of original jurisdiction, in which the fair compensation to be made for property taken for public uses had been judicially inquired into

and ascertained, could be attacked and enjoined by a suit in the United States Circuit Court?

If any right under the Constitution and laws of the United States of the owner of property taken in any such condemnation proceedings has been denied to him by the State Court, his only, but his adequate, remedy is by appeal to the highest court of the State, and if that court shall sanction such denial to him of any right under the Federal Constitution or laws, then to come to this Court by writ of error for redress of any such wrong or injustice.

He is no more denied access to the U. S. Circuit Court in the one instance than in the other. In neither case can he invoke the jurisdiction of those courts, for the same reason in both, namely, that no Federal courts, nor any Federal tribunal, has from the nature of things any original jurisdiction of the subject.

No Federal Court has or can have any jurisdiction or power to conduct proceedings for taking private property of a citizen of a State for the public uses of such State, or of any political sub-division thereof. And no Federal Court or other Federal tribunal can have any jurisdiction or power to determine or prescribe the rates of charge to be made by an intrastate carrier for transportation within the limits of the State, or otherwise control or regulate the domestic, and intrastate commerce of such State.

There is, therefore, no denial whatever to the carrier of any Federal or other right, when he is limited to the authority and jurisdiction of State tribunals of first instance for relief against possible wrongs or injustice, or redress against the denial of some right secured to him by the Federal Constitution,

when from the nature of things, and from the very character of the subject-matter of the litigation, the States alone are empowered under the Constitution and the institutions of the country, to deal with such subjects in the first instance, and when the carrier is given adequate and valid mode of redress in an orderly and legal manner, against any denial of any Federal right, by carrying his case to the highest court of the State, and thence by writ of error to this the court of last resort.

Virginia has provided by her laws that proceedings for determining and prescribing what rates may be justly and reasonably charged by transportation companies, shall be similar to, and conducted in substantially the same fashion as, proceedings for taking private property for public uses of the State, except that she has been even more sedulous and careful to safeguard and require that due process of law, and the equal protection of the laws, and an absolutely fair trial shall be guaranteed to the carrier whose rates are being adjudicated and prescribed, than she has been in respect to proceedings for the taking of private property for her public uses.

Similar considerations apply, though not so strongly, to that great mass of litigated causes involving the rights of multitudes of people, the parties to which causes cannot invoke the jurisdiction of the United States Circuit Courts, because the amount involved in each of such cases is less than $2,000.00.

As to all of these cases, as well as to the cases here submitted, the rule for which we contend as a rule of law, is also a benign and salutary rule of inter judicial comity, and is supported by the just assumption that the States, and the tribunals of the States, can be trusted and ought to be trusted to deal with these important matters of local concern, without abrupt

interference by the judges of the subordinate courts of the United States, and upon the further well-founded consideration that it is best not only for the States, and for the people of all the States, and most emphatically best in the long run for the transportation companies also, that these delicate and important matters of intrastate and domestic concern shall be largely left for adjustment in the first instance to the tribunals established by the State.

WILLIAM A. ANDERSON,

of Counsel for Appellants.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

THE VIRGINIA CORPORATION COMMISSION CASES.

BRIEF OF ARGUMENT FOR APPELLANTS BY JOHN W. DANIEL, OF COUNSEL.

ROBERT R. PRENTIS, HENRY C. STUART, and JOSEPH E. WILLARD, *Constituting the State Corporation Commission of Virginia, and* R. T. WILSON, *Clerk Thereof, Appellants,* *versus* ATLANTIC COAST LINE RAILROAD COMPANY, *Appellee.*	No. 270.
SAME, *Appellants,* *versus* THE CHESAPEAKE & OHIO RAILWAY COMPANY, *Appellee.*	No. 271.
SAME, *Appellants,* *versus* CHESAPEAKE WESTERN RAILWAY COMPANY, *Appellee.*	No. 272.
SAME, *Appellants,* *versus* LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee.*	No. 273.
SAME, *Appellants,* *versus* NORFOLK & WESTERN RAILWAY COMPANY, *Appellee.*	No. 274.
SAME, *Appellants,* *versus* SOUTHERN RAILWAY COMPANY, *Appellee.*	No. 275.

I.

Statement.

May it Please the Court:

This is the Supreme Court of the United States, the highest court in the country. I have the honor to appear before it with Hon. W. A. Anderson, the Attorney General of Virginia, and Hon. Allen Caperton Braxton, in behalf of the Virginia court entitled "The State Corporation Commission of Virginia." By the law of Virginia the State is itself a party.

The validity of the Constitution of Virginia is questioned here by the attorneys of the Railway Companies which were defendant below and are here appellees.

The very nature of the case makes it one between sovereignties. The sovereignty of the United States is represented by this tribunal. The sovereignty of the State of Virginia is in issue before this tribunal—the sovereignty of Virginia as represented by its ordained constitution, as expounded and adjudged by the Supreme Court of Appeals of Virginia in a number of cases, and as exercised by the court below, known as the State Corporation Commission.

That this is a court, no man can question. That the State Corporation Commission is a court, no man can question, unless it be true that States can no longer make constitutions save by the approbation of the Federal judicial power.

The State Corporation Commission Organized as a Court of Judicature.

In legal contemplation we see that the State Corporation was organized to be a court, when we read the 155th and 156th section of the Constitution.

We see also that it was enacted under authority of those sections of the Constitution to be a court of record and judicature by the General Assembly of Virginia, when we read the act of April 15, 1903.

As the Courts of England derived their power from the King as the fountain and dispenser of justice, and then from the statutes of Parliament, enacted in furtherance of their ample jurisdiction and effective operation, so in Virginia this "State Corporation Commission" derives its existence and powers from the Constitution, ordained as our fundamental law, and from the act of Assembly of April 15, 1903, which puts into effective operation the provisions of the Constitution relating to the creation, appointment, and organization of the State Corporation Commission.

When we look at the State Corporation Commission as an organized body, we behold the provisions of law translated into actuality, and realize that it has the complete organism of a court, with all of the paraphernalia and insignia of a court in full and effective operation, and entitled to all the respect, privileges, and immunities that belong to judicial establishments.

Especially does it come within the purview of the Federal statute that prohibited it from being enjoined since 1793.

How These Cases Arise.

A rule to show cause, etc., was addressed by the State Corporation Commission of Virginia to all the steam railroads in Virginia on July 31, 1906. They were advised thereby that on *November 1, 1906*, the Commission would hear and consider any objections which might be urged against the prescribing by the Commission of a maximum rate of two cents

per mile from the intrastate passenger business of these companies in Virginia.

The case was called November 1. The defendant railroad companies appeared and answered. From that date to April 27, 1907, the question involved in the rule was considered upon voluminous testimony, the then defendants being represented by counsel Hon. A. P. Thom, and the State by the Attorney General of Virginia, Hon. W. A. Anderson, and Hon. A. C. Braxton.

Final Order or Decree.

On *April 27, 1907*, an order was entered by the Commission prescribing certain maximum rates for intrastate passenger business of said companies, to take effect on and after July 1, 1907.

1. TWO CENTS PER MILE were prescribed as the maximum rates for passenger transportation to be observed, on and after the first of July, 1907, by the following steam railroad companies:

Norfolk and Western; Chesapeake and Ohio; Atlantic Coast Line; Seaboard Air Line; Southern; Richmond, Fredericksburg, and Potomac; Washington-Southern; New York, Philadelphia, and Norfolk; Virginia and Southwestern; Louisville and Nashville.

2. TWO AND A HALF CENTS PER MILE by the following divisions of the Southern Railroad:

Norfolk Division, extending from Pinner's Point to Danville, 204 miles, exclusive of so much of the said division as may be in the State of North Carolina;

Franklin Branch, extending from Franklin Junction to Rocky Mount, 37 miles;

Claremont Branch, extending from James River Junction to Claremont, 50 miles.

3. THREE CENTS PER MILE by

Chesapeake-Western; Cumberland Valley and Martinsburg; Danville and Western; Indian Creek and Pound; Marion and Rye Valley; Nelson and Albemarle; Valley; Virginia-Carolina; Virginia Southern; Winchester and Potomac; Winchester and Strasburg; Norfolk and Southern.

4. AND THREE AND A HALF CENTS PER MILE by

Big Sandy and Cumberland; Black Mountain; Interstate; Lick Creek and Lake Erie; Mt. Airy and Eastern; New River, Holston, and Western; Potomac, Fredericksburg, and Piedmont; Surry, Sussex, and Southampton; Tidewater and Western; Virginia Anthracite Coal; Virginia and Kentucky; Wise Terminal Company.

The Order of Publication Required by Law Enjoined by U. S. Court.

Direction was given to R. T. Wilson, clerk of the Commission, to publish the order once a week for four consecutive weeks in one of the Richmond papers in conformity with the Virginia statute as in such case by law provided.

The clerk proceeded to publish the order, *but before the four weeks had elapsed and the legal publication completed* suits were brought by the C. & O. Railroad, the N. & W. Railroad, the Atlantic Coast Line Railroad, the B. & O. Railroad, and the Chesapeake Railroad Company to enjoin further pro-

ceedings by the Commission or its clerk in the matter of publication, and to transfer the controversy to the Circuit Court of the United States for the Eastern District of Virginia. A restraining and enjoining order was issued, and the defendants were ruled to show cause against the granting of the interlocutory injunction on June 27, 1907. Nearly six months were occupied in the hearing, with of course some intermission.

If the Virginia State Corporation Commission was a "Court"—and it was then made manifest that it was—Federal jurisdiction did not obtain, injunction was prohibited by statute law and by the comity of courts alike, and the appellees here must be cast in their suit and the demurrer must be sustained.

II.

Validity of the Virginia State Corporation Commission as a Judicial Court Considered.

The Virginia court is just as much a court as this is a court, although they are of different jurisdictions.

The analysis and comparison of the judicial elements of both courts shows this.

The Supreme Court of the United States and the Virginia State Corporation Commission are both courts of judicature, and parts of the judicial system to which they belong, in the highest sense of law, and the visible differences between them as courts are:

(*a*) That this court follows the ancient English fashion of wearing silk gowns, while the Virginia court still observes the more prevalent fashion of ordinary citizens' dress.

(*b*) The second difference is one of nomenclature. This court has the name "Court" in its title.

Names do not make things. A rose by any other name would smell as sweet, a thorn by any other name would prick as sharply, and water would be just as wet if it were called land. The name "Commission" has nothing to do with the matter.

Let the same identical characteristics of these two courts —the Supreme Court of the United States and the Virginia (Commission) Court—be noted.

The Commission of Appeals of New York was just as much a court as if it had been called so.

The Senate of New York was a Court of Appeals for the correction of errors when William H. Seward was a member thereof, and just as much so as if it had been called a court.

The Legislature of Massachusetts is called "The General Court of Massachusetts," but it is none the less a legislative body.

Identities in the Supreme Court of the United States and the Virginia State Corporation Commission in Their Judicial Nature and Organization.

(1) *Both Constitutional Courts:*

The *"State Corporation Commission of Virginia"* is like this court in one fundamental paramount respect—THIS COURT IS EMBODIED IN THE CONSTITUTION OF THE UNITED STATES, AND THE STATE CORPORATION COMMISSION IS EMBODIED IN THE STATE CONSTITUTION OF VIRGINIA. They are therefore both constitutional courts, and in their respective spheres of dignity they cannot be excelled nor inter-

fered with, for sovereignty cannot be assailed save by an enemy.

Here, then, in legal pleadings at least, sovereignty meets sovereignty face to face, and those of us who appear in behalf of Virginia and her Constitution have at least the satisfaction of standing before our peers.

Never yet has this court demolished the integral character of a State court.

It knows and has acted upon the knowledge that States have just the same right to establish their courts as the United States has to establish its courts.

The scene here is a strange one, without a precedent, but the question of the validity of the Virginia Constitution and of the court therein established is not to our minds either novel or difficult.

(2) *The Personnel of the Courts:*

This court is composed of nine judges, all eminent lawyers. The Virginia court is composed of three judges, as have been and are some of the supreme courts of the American States.

The utmost care has been taken with respect to the personnel of each court—in the one case by Congress, in the other case by both the Constitution and laws of Virginia.

The qualification of the judges of the Virginia court are prescribed in the Virginia Constitution, and the qualifications of one of them therein required to be the same as the qualifications prescribed for judges of the Supreme Court of Appeals. Two of them, in fact, are ex-judges and have such qualifications (Virginia Constitution, section 155).

The three Commissioners are:

(1) Hon. Robert R. Prentis, who resigned from the circuit

bench to accept the place he now holds. He is now the chairman of the Commission, and is a gentleman of long experience as a judge.

(2) Hon. Henry C. Stuart, a gentleman of large landed interest and of commercial interest as well, late a member of the Virginia Constitutional Convention.

(3) Hon. William F. Rhea, late for two terms a member of Congress, and before that a judge of the State in the city of Bristol.

Judge Prentis took the place formerly occupied by Judge Crump, who resigned his circuit judgeship, like himself, to accept it.

Judge Rhea took the place of Hon. Joseph E. Willard, a lawyer of education and practice, who had been Lieutenant-Governor of the State and a member of the State Senate, and is a man of large affairs, reputed the wealthiest in the State.

The personnel of the court compares favorably to that of any tribunal in the land.

(3) *Both Sit in Capitol Buildings:*

This court sits in the Capitol of the United States. The Virginia Commission Court sits in the Virginia Capitol.

(4) *Judges Appointed by the Executives of the Nation and the State Respectively. Double Guard on Their Confirmation in Virginia:*

As the judges of this court are appointed by the President, subject to the confirmation of the Senate, so the Virginia commissioners have been appointed by the Governor, subject to the confirmation and of course of rejection by the General Assembly of the State, the two houses sitting in joint session.

There is therefore in Virginia a double guard against any unsuitable appointment, whereas only one House of Congress, the Senate, can pass upon the confirmation of a judge of the Supreme Court.

(5) *Both Courts Have Presiding Officers:*

(4) The court is presided over by the Chief Justice of the United States; the State Corporation Commission by a chairman, who acts as Chief Justice.

The Constitution says:

> "The commission shall annually elect one of their members chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed and subject to removal by the commission" (section 155, Virginia Constitution).

(6) *Both Courts of Record:*

As this is a court of record, so is the Virginia State Corporation Commission, for it is expressly provided with respect to all matters "within the JURISDICTION of the Commission it shall have the powers and authority of a COURT OF RECORD—to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements against the delinquent or offending party, after it shall have first been duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard as well against the validity, justness, or reasonableness of the

order or requirement alleged to have been violated as against the liability of the company for the alleged violation, such fines or other penalties as may be prescribed or authorized by this Constitution or by law. (See Constitution of Virginia, section 156.)

> "In hearing and deciding the question in controversy between the litigating railway companies, the Commission was acting in its capacity as a COURT OF RECORD" (N. & W. R. R. Co. *vs.* Tidewater R. R. Co., 105 Va., 131—Buchanan, Jr., giving unanimous opinion of Supreme Court of Appeals).

(7) *Dockets and Preferred Cases. When a Preferred Case by Law in Virginia, and by Action of the Court Here:*

This court has a docket and may prefer cases for hearing. So has the Virginia Commission a docket of cases, which of course it controls as this court controls its docket, and when there is an appeal from the Commission to the Supreme Court, all such appeals affecting rates, charges, or classifications of traffic shall have precedence upon the docket of the appellate court and shall be heard and disposed of promptly by the court, irrespective of its place of session, next after the *habeas corpus* and Commonwealth cases already on the docket of the court. (See Constitution of Virginia, section 156.)

(8) *As to the Officers of the Two Courts:*

This court has a complement of officers; so has the Virginia court, styled Commission. It has a clerk, a first assistant clerk, a bailiff, and a stenographer (who shall also be a typewriter), who are bonded by the Commission, and neither

in this nor in any other court is to be found a better equipment for the hearing and decision of causes (act of April 15, 1903; sections 7, 11, 12, 13, and 14).

(9) *Oaths of Office:*

The judges of this court are required to take the oaths of office. The Virginia judges, "Commissioners," are required to take the usual oath prescribed by the Virginia Constitution.

They all have been required to take the following oath:

> "I, —— ——, do solemnly swear (or affirm) that at the present time I am not employed by, and do not hold any office in relation to, any transportation or transmission company, and have not in anywise any financial interest in any such company, and am not engaged in the practice of law, and that during the term of my office as — I will not, either directly or indirectly, be employed by or hold any office in relation to any transportation or transmission company, or in anywise be financially interested in any such company, or be engaged in the practice of law, so help me God."

(10) *Jurisdiction of the Two Courts:*

The jurisdiction of this court applies to a great diversity of subjects—intrastate, interstate, national, and international.

The jurisdiction and adjudications of the Commission apply to the intricate subjects of "rates, charges, or classifications of traffic, schedules, facilities, conveniences of service."

The Virginia Court is always open for the correction or alteration of rates or the making of rates for the future, so that, like a directory, its mind may be always as accommo-

dating to circumstances and conditions as the mind of any body of men.

Appeals from its adjudications lie to the Supreme Court of Appeals only. None but that court, when it takes jurisdiction by appeal, can "enjoin or restrain it," or "reverse, correct, or annul" its action, or "suspend or delay" its execution or operation thereof. But writs of mandamus and prohibition lie.

(11) *The Two Courts in Jurisdiction and Practice as to Rates:*

This court has jurisdiction both in law and equity as well as in a great variety of other cases of dignity and moment to the whole country. It has also jurisdiction to say whether or not a rate in an appropriate case is reasonable and just.

So has the Virginia Court, but its jurisdiction is extended to fix rates for the future.

Courts of equity control allowances for the future from guardian to ward, from trustees to the *cestui que trust,* and to those asking alimony, or allowance from a trust fund that is supervisory by a court.

There is no reason, in the nature of things, where an allowance for the future in any matter that comes before a court should not be fixed by the judge or judges thereof, and the fact is that it is done wherever the case is jurisdictional to the court.

Judges do fix rates for the future through receivers in both passenger and freight rate cases whenever such matters are devolved upon equity cognizance.

In any appropriate case where this court had upon review the action of a receiver who had fixed rates that were not

reasonable and just, it would decide the matter as to it seemed right, and it is absurd to suppose that a Constitution of a State, which is the law of the land, cannot devolve the fixing of rates upon judges of as high dignity and importance as its Supreme Court, and equally absurd to suppose that upon hearing the matter they would not be as competent as a receiver, who is only the subordinate hand of the court. It is doubtful if there is a man in this building who has not ridden upon railways where the rates were fixed by receivers under the supervision of the court, which in such cases could either alter the rate up or down, or fix it, or confirm it, or refer it to a commissioner for inquiry.

Judges have often been charged with the duty of fixing charges for the future, in the courts of England, of Virginia, and of other States.

When sovereignty speaks by the King, by Parliament, by Congress, or by the ordainment or enactment of a State, they must do so. And it is for the public weal as well as by the public mandate.

(12) *Salaries of the Two Courts:*

The judges of this court receive salaries proportioned to the dignity of their office.

The Corporation Commissioners of the Virginia court likewise receive salaries showing the dignity of their office.

(13) *Both Courts Make Rules, Which is the Office of Courts:*

It is provided "that the Commission shall cause its rules of order and procedure to be entered upon the records of its proceedings and to be printed, as well as all amendments and additions to the same, and shall

furnish copies thereof to county and city clerks, and to any citizen of this State upon application thereof" (section 25, act of April 15, 1903).

(14) *Writs, Processes, and Orders Run in the Name of the Commonwealth of Virginia:*

The style of procedure and the process are after the ancient fashion of English and American courts.

The record shows that from the initiative to the last act of the Commission (until it was enjoined) there had been strict compliance with well-known forms of law. The defendant corporation was haled into court by a summons to show cause why a certain rate should not be prescribed by the regulations of the State Corporation Commission, and, responding thereto, the corporate defendant filed its answer and appeared by its attorney, namely, Hon. A. P. Thom.

(15) *Counsel Appeared for Both Sides:*

The State of Virginia also appeared by its Attorney General, Hon. Wm. A. Anderson, and Mr. A. C. Braxton. So the three constituent parts of which a court must at least consist, according to Blackstone—that is to say, the *actor,* represented by the Attorney General and his associate; the *reus,* the defendant corporation, likewise represented by its attorneys, and the *judex,* or judicial power, to use Blackstone's precise language,

> "Which is to examine the truth of the fact, to determine the law arising upon the fact and if any injury appears to have been done, to ascertain, and, by its officers, to apply the remedy."

(16) *Proceedings as in Courts of Record, and Only Judicial Evidence Heard:*

Proceedings are as in courts of record, and the Commission shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of Virginia in like manner as to complainant and defendant in the courts of the Commonwealth.

(17) *The Commonwealth of Virginia a Party:*

In all proceedings, contests or controversies by or before the Commission, whether instituted by the Commonwealth or the Commission by its own motion, the Commonwealth shall be complainant and the party against whom the complaint is held or the proceedings instituted shall be the defendant.

Any party is entitled to process to convene parties, to compel attendance of witnesses or the production of books or papers in any proceeding. (See Act of April 15, 1903.)

(18) *The Power to Punish for Contempt:*

In this court, and in Corporation Commission Court of Virginia alike, the power to punish for contempt or disorderly behavior in court is one of the attributes of the judges; and it extends to acts of a contemptuous character, whether committed in court or out of it, by litigants or their lawyers or by others.

In the State of Virginia the Supreme Court of Appeals has held that the power to punish for contempt is "inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied because it is necessary to the exercise of all other powers.

Without such power the administration of the law would be in continual danger of being thwarted by the lawless" (Carter *v.* Commonwealth, 96 Va., 791). For these reasons the Virginia court held that the General Assembly could not abolish the power and substitute jury trials. Statutes authorizing courts to punish for contempt are declaratory of the common law (State *v.* Fredlock, 52 W. Va., 232. See on this subject Burdett *v.* Commonwealth, 103 Va., 838; Commonwealth *v.* Dandridge, 2 Va. Cases, 408; Wells *v.* Commonwealth, 21 Gratt., 503; August *v.* Gilmer, 53 W. Va., 65; State *v.* Frew, 24 W. Va., 416).

(19) *Judgments of the Virginia Court:*

"Judgments of the Commission for the recovery of money, fines, or penalties constitute a lien on the real estate of the judgment debtor, when duly docketed and indexed in the judgment lien docket as the judgments of the courts of record are required by law to be docketed and indexed in the county or city in which the real estate of the judgment debtor is located, and the lien of such judgment may be enforced in equity before any court having jurisdiction to enforce liens, and clerks of the courts of the several cities and counties shall docket all such judgments on the lien docket of their respective courts when a copy thereof, certified by the clerk of the commission, shall be presented for that purpose" (section 32, act of April 15, 1903).

(20) *Appeals to the Supreme Court of Appeals are Matters of Right:*

This court is appellate, and of original jurisdiction also. The Virginia court has original jurisdiction of the cases here-

tofore noted, and appeals lie as matters of right to the Supreme Court of Appeals of Virginia.

Any party may appeal.

Appeals shall be heard and disposed of promptly.

They are preferred on the docket.

The chairman of the Commission certifies under the Commission's seal all the facts to the Supreme Court of Appeals, with "such of the evidence" taken before the Commission "as may be selected, specified, and required to be certified by any party in interest as well as such other evidence so introduced and considered as the Commission may deem proper to certify." See Constitution of Virginia, sec. 156, *d*, *e*, and *f*, Code CCLIV.

(21) *The Commission Opinion to be Filed:*

The Commission must file with record of appeal as a part thereof "*a written statement of the reasons* upon which the action appealed from was based," and "such statement shall be heard and considered by the Appellate Court." Sec. 156, *f*, Code CCLV-CCLVI.

(22) *Supreme Court of Appeals to Make Such Order as Commission Should Have Made if Reversing its Order:*

Virginia has ordained with respect to the appeal from the Commission to the Supreme Court of Appeals that "WHENEVER THE COURT UPON APPEAL SHALL REVERSE AN ORDER OF THE COMMISSION RESPECTING THE RATES, CHARGES, OR CLASSIFICATIONS OF ANY TRANSPORTATION OR TRANSMISSION COMPANY, IT SHALL, AT THE SAME TIME, SUBSTITUTE THEREFOR SUCH ORDER AS, IN ITS OPINION, THE COMMISSION SHOULD

HAVE MADE AT THE TIME OF ENTERING THE ORDER APPEALED FROM; OTHERWISE THE REVERSAL ORDER SHALL NOT BE VALID." Constitution of Virginia, sec. 156, *f*, Code CCLVI.

Thus in the most solemn form known in the affairs of men has Virginia committed solely to her judiciary the adjudication from beginning to end of the great matter involved in this cause.

A Model.

Thus is everything, including opinion of the Commission court, laid before the Supreme Court of Appeals of Virginia and the wit of man has not yet devised or perfected a scheme better conceived to serve the ends of justice.

Indeed, we may say that Virginia has furnished a model which will be followed by other States as our great Republic grows in population, in wealth, and in the intricacy of all matters interwoven with the already complex problem of rate making and enforcing. The time is not far distant when the United States will be forced by the gravity of its prodigious concerns to adopt the Virginia plan, in substance by a Commission of Judicature, and by bestowing upon its highest courts the full powers the Virginia Constitution has bestowed upon the Supreme Court of Appeals of that Commonwealth.

Is it possible that this plan could be destroyed by any court of the United States—unimpregnable as it is—by any principle of the Federal Constitution or laws which have been so thoroughly respected? We believe not. It would be astounding. The precedent would be a counterblast to the feet of inevitable progress; to the comity that should be cultivated between the Nation and the State; to the jurisprudence of more than one hundred years of American

history; to the principles interpreted, construed and applied by the first of the American constitutions; and to the revolution of the people in 1776.

III.

Confirmation of the Virginia Court by the Supreme Court of Appeals of Virginia.

This court respects the law in constitutions and statutes as expressed by the States, especially when they have been construed and confirmed by the highest court of the State concerned in the decision.

In Commonwealth *v.* Atlantic Coast Line Railway Company, 106 Va., p. 61 (November, 1906) the Supreme Court of Appeals of Virginia unanimously determined that—

(1) The State Corporation Commission, in determining the liability of a corporation for a fine or forfeiture imposed by a statute which it is required to enforce, acts JUDICIALLY, and may declare the act imposing such fine or forfeiture unconstitutional.

In the course of this opinion the court unanimously said that—

> "The learned Attorney-General, as the highest law officer of the Commonwealth, urged upon the Commission that in this proceeding it was invested with all the powers and had imposed upon it all the responsibility of a court of record.
>
> "He earnestly contended that the Commission not only had the judicial authority to pass upon these constitutional questions, but that it was its manifest duty to do so, in so far as it was necessary to reach a final conclusion.

> "This position of the Attorney-General was not combatted by the learned counsel for the defendant company, but was conceded to be correct. It is indeed no longer open to question."

Thus, in a case anterior to this one, things now combatted were conceded by the counsel for the litigant corporation.

In Norfolk & P. R. R. Co. *v.* Commonwealth, 103 Va., 289, the Supreme Court of Virginia said:

> "In this Commonwealth the State Corporation Commission created by constitutional authority is the instrumentality through which the State exercises its governmental powers for the regulation and control of public-service corporations. For these purposes it has been clothed with legislative, judicial, and executive powers."

In Winchester & Strasburg Railroad Company *v.* The Commonwealth, 106 Va., 264, the Supreme Court of Appeals, the highest court of judicature in the State, fully heard and determined the validity of the constitutional provision framing the Virginia State Corporation Commission and conferring upon it judicial, legislative, and administrative powers. To the same effect are cases of the Atlantic Coast Line *v.* Commonwealth, 102 Va, 599; Norfolk County *v.* Commonwealth, 103 Va., 294, and Atlantic Coast Line *v.* Commonwealth, 106 Va., 61.

It is admitted that in some degree powers in their nature legislative, executive, and judicial are conferred on the same body by the Virginia Constitution. In this case the powers are directly conferred by the Virginia Constitution.

In this case the powers are directly conferred by the Virginia Constitution.

Transcript of the Unanimous Opinion of the Supreme Court of Appeals of Virginia in Winchester and Strasburg R. R. Co. v. Commonwealth, 106 Va., 268.

We will now produce extracts from the opinion of the Supreme Court of Appeals of Virginia in the Winchester and Strasburg R. R. Case, wit hthe points of its conclusions interlineated.

(1) *Not against Bill of Rights—Administration of Government impracticable without intermerging legislative, executive and judicial powers.*

Harrison giving the opinion said:

> "The concentration of these three powers of government in the Corporation Commission is not in contravention of the Bill of Rights. That declaration is part of the constitution, which expressly provides that 'Except as hereinafter provided, the legislative, executive and judiciary departments shall be separate and distinct,' thereby recognizing the well accepted view that the administration of the government would be wholly impracticable if that general maxim were strictly, literally and unyieldingly applied in every possible situation" (106 Va., 268).

(2) *Abundant illustrations in England, the United States, and the several States.*

> "The Federal Government, as well as the State governments, abounds with illustrations of the intermingling of such powers in one person or body. The British constitution fully recognizes the wisdom of keeping separate these three great departments of the

government, and yet it furnishes a most conspicuous illustration of the fact that it is impossible for any government to literally fulfill the terms of that maxim without any qualification—the House of Lords is a part of both the legislative and of the judicial branches of that government. It is undoubtedly true that a sound and wise policy should keep these great departments of the government as separate and distinct from each other as practicable. But it is equally true that experience has shown that no government could be administered where an absolute and unqualified adherence to that maxim was enforced.

"*The universal construction of this maxim* (against the commingling of powers) *in practice has been that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another to a limited extent.* This practical construction of the maxim has been recognized with approval by the Supreme Court of the United States" (106 Va., 268).

(3) *Precedents in the Supreme Court of the United States cited. The Connecticut case.*

"In Calder *v.* Bull, 3 Dallas, 386, it appeared that the legislature of the State of Connecticut had undertaken to set aside the judgment and award a new trial in a private litigation which had been concluded in the courts of that State. The Supreme Court of Appeals of Virginia, citing this case in Winchester, &c., Railroad Company *v.* Commonwealth, 106 Va., 269, says: 'This action of the Connecticut legislature was attacked in the Supreme Court of the United States, and amongst other things it was charged to be invalid

because it was a legislative invasion of the judiciary department of government. No one denied that this was true, but the court held that under the Constitution of Connecticut the legislature could perform judicial functions, and that there was nothing in the Federal Constitution with which such a state of affairs conflicted; that the legislature acted in a double capacity, as a house of legislation with undefined authority and as a court of judicature in certain exigencies' (Patterson, J., Calder *v.* Bull, 3 Dallas, 394-5). In pointing out that this combination of legislature and court in one body was not in violation of the Federal Constitution, Iredell, J., in the same case, adverted to the fact that the House of Lords in England was the supreme appellate court of that country, and Cushing, J., said that 'although the act (of the Connecticut legislature) is a judicial act, it is not touched by the Federal Constitution.'"

(4) *Nothing in Constitution of the United States forbidding legislature to exercise judicial powers.*

"The same point was reiterated by the Supreme Court in Satterlee *v.* Matthewson, 2 Peters, 380-413; 7 L. Ed., 458, in which the court said:

"There is nothing in the Constitution of the United States which forbids the legislature of a State to exercise judicial functions. It may safely be affirmed that no case has ever been decided in this court upon a writ of error to a State court which affords the slightest countenance to this objection'" (106 Va., 268-269).

(5) *United States Supreme Court maintains the competency of a State to unite in* ONE BOARD OR TRIBUNAL *some of the legislative, executive, and* JUDICIAL *powers of government.*

Judge Harlan's views:

> "The doctrine that it is competent for a State to unite in one board or tribunal some of the legislative, executive, and judicial powers of the government, as well as the further proposition that when a State does this it violates no prohibition of the Federal Constitution, and that any such question is one for the determination of the State, its action in the matter being accepted as final, is well supported by the more recent case of Dreyer *v.* Illinois, 187 U. S., 57, 84; 47 L. Ed., 79; 23 Sup. Ct., 28, in which Mr. Justice Harlan, delivering the unanimous opinion of the court, says: 'Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State, and its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty'" (106 Va., 269-270).

(6) *United States Supreme Court cites Story, showing that the matter requiring separation of power must be understood in "a limited sense."*

> "'When we speak,' said Story, 'of a separation of the three great departments of government, and main-

tain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. THE TRUE MEANING is that the whole power of one of these departments SHOULD NOT BE EXERCISED BY THE SAME HANDS WHICH POSSESS THE WHOLE POWER OF EITHER OF THE OTHER DEPARTMENTS; and that such exercise of the whole would SUBVERT THE PRINCIPLES OF A FREE CONSTITUTION' (Story's Const., 5th Ed., 393)."

(7) *Every State Constitution shows admixture of powers.*

"Again: 'INDEED THERE IS NOT A SINGLE CONSTITUTION OF ANY STATE IN THE UNION WHICH DOES NOT PRACTICALLY EMBRACE SOME ACKNOWLEDGMENT OF THE MAXIM AND AT THE SAME TIME SOME ADMIXTURE OF POWERS CONSTITUTING AN EXCEPTION TO IT' (Story's Const., 5th Ed., 395. See also Reetz *v.* Michigan, 188 U. S., 505; 47 L. Ed., 563; 32 Sup. Ct., 390; Lieberman *v.* Van De Carr, 199 U. S., 552; 50 L. Ed., 305; 26 Sup. Ct., 144" (106 Va., 270).

(8) *Virginia Constitution treats all alike who are in similar circumstances, and applies* (1) EQUAL PROTECTION OF THE LAWS, (2) *and* "DUE PROCESS OF LAW."

"A further ground of objection urged to sections 155 and 156 of the Virginia Constitution, and the laws passed in pursuance thereof, is that in so far as the Constitution and laws of Virginia subject the companies mentioned in those sections, in the matter of their public duties and charges, to the control of a commission clothed with legislative, executive and

judicial functions, and deny to them access to the law courts of the State, which are not clothed with 'legislative, executive, and judicial functions,' such as every other person, private or corporate, has access to, said Constitution and acts make a discrimination against such companies and deny to them the equal protection of the laws and deprive them of their property without due process of law" (106 Va., 270-271).

"There is no denial of the equal protection of the laws when all persons in like condition and under like circumstances are treated in the same way, made liable to the same regulations and subjected to the same penalties for failure to comply with the just requirements of such regulations. The jurisdiction complained of applies alike to all companies and persons engaged in the business of transportation, and there is no discrimination against any railroad or other transportation company, or in favor of any person, who engages in the business of a common carrier. All stand alike and are dealt with alike" (106 Va.).

(9) *The Supreme Court of Appeals of Virginia cites numerous precedents of this court.*

"The Supreme Court of the United States has, in many cases, held that the Fourteenth Amendment does not impair the right of the States to classify any subjects with which their laws deal, provided only that the classification is a reasonable and not a mere arbitrary one, without any reason to support it" (106 Va., 271).

"In Barbier *v.* Connolly, 113 U. S., 32; 28 L. Ed., 923; 5 Sup. Ct., 360, it is said: 'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the

sphere of its action it affects alike all persons similarly situated, is not within the amendment.'

"In Missouri Ry. Co. *v.* Mackey, 127 U. S., 209; 32 L. Ed., 107; 8 Sup. Ct., 1163, it is said: 'The objection that the law * * * deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that the legislation which is special in its character is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of our legislation is special, either in the object sought to be attained by it or in the extent of its application. * * * Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws because it is special in its character. When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.' (See also Kentucky Ry. Tax Cases, 115 U. S., 322; 29 L. Ed., 414; 6 Sup. Ct., 57; Pac. Ex. Co. *v.* Seibert, 142 U. S., 339; 35 L. Ed., 1035; 12 Sup. Ct., 250; McGowan *v.* Ill. Trust & Sav. Bk., 170 U. S., 283; 42 L. Ed., 1037; 18 Sup. Ct., 594; Tinsley *v.* Anderson, 171 U. S., 106; 43 L. Ed., 91; 18 Sup. Ct., 805; Orient, &c., Co. *v.* Daggs, — U. S., 557; 43 L. Ed., 552; 19 Sup. Ct., 281; Field *v.* Barber Asphalt Co., 194 U. S., 621; 48 L. Ed., 1141" (106 Va., 271-272).

"In the last case cited the doctrine announced in many other cases is reiterated in these words: 'It is not the purpose of the Fourteenth Amendment, as has frequently been held, to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different

individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed.'

"That the appellants are not deprived of their property without due process of law is clear from what has been already said and the authorities cited" (106 Va., 272).

(10) *The Constitution of Virginia both shows and requires the explicit fulfillment of due process of law.*

"In Iowa, &c., Co. *v.* Iowa, 160 U. S., 393; 40 L. Ed., 467; 16 Sup. Ct., 345, it is said that 'it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided.'

"The constitutional provision creating the Corporation Commission expressly directs and requires that the proceedings before it shall be by 'due process of law.' Under that proceeding the railroad companies are duly notified and summoned to appear at a special time and place before an impartial tribunal provided by law to hear and determine the matter in dispute, and show cause, if any they can, why a suggested or proposed action should not be given effect. At such hearing the railroads are allowed, as a matter of right, to be represented by counsel, to examine and cross-examine witnesses, to produce any and all legal evidence in their behalf, and to be fully heard in their own behalf on all matters of law or fact which they may desire to allege or put forward in their own de-

fense. And all this before any decision or action adverse to their interests can be rendered. It has been held that the right of appeal is not an essential element in due process of law. Reetz *v.* Mich., 188 U. S., 508; 47 L. Ed., 563; 23 Sup. Ct., 390" (106 Va., 272-273).

(11) *The Supreme Court of Appeals of Virginia shows the inherent power of regulation of public service corporations, and the necessity of the solution contained in the Virginia Constitution.*

"That the State has the inherent power of regulating and controlling public-service corporations operating within her borders, and of prescribing the facilities and conveniences which shall be furnished by them is no longer an open question in this country. The just regulation and control of such companies has been a difficult problem for many years. The Virginia State Corporation Commission, as created and defined by Article XII of the Constitution, was devised as a solution of that problem. The exigencies of the situation made it necessary that the Commission should be clothed, to some extent, with legislative, executive and judicial functions, and in view of what has been said, and in the light of the authorities cited, we are of opinion that the section of the State Constitution, and the statutes enacted in effectuation thereof, from which the State Corporation Commission derives its existence and its powers, violate no provision of the Federal Constitution, and are in conflict with no principle essential to the preservation of liberty. It follows, therefore, that the State Corporation Commission is a legitimate and valid tribunal, with full power to determine the subject-matter of controversy presented by this proceeding" (106 Va., 273-274).

(12) *More complete provision for "due process of law" inconceivable.*

> "Out of abundant caution, however, the constitutional provision authorizing this proceeding also authorized an appeal by the railroads from any decision of the Commission in such proceedings, with which the railroads may be dissatisfied. And whereas, in almost every other case involving the rights of individuals the right of appeal is addressed to the sound discretion of the appellate court, yet in this case the appeal is given to railroads absolutely, as of right; and whereas, in most appeals involving the rights of individuals there is a jurisdictional amount limit, yet in this case the railroads are given an appeal without limit as to the amount involved. It is difficult to conceive of more complete provision for 'due process of law' than is secured to the parties concerned by these proceedings" (106 Va., 273).

IV.

Mixture of Powers Determined by the State and Brings no Federal Question Here.

This court holds that the State has sole determination of the question, follows the State, and considers that no question of due process arises.

There is nothing in the Constitution of the United States that either expressly or impliedly prohibits the intermixture of legislative, executive and judicial powers in constitutional grant by the State or power to any State court.

Free and unfettered as to the architecture of its own institutions, the State may fashion them according to her own

free and untrammeled will, provided only that she does not violate in any of the provisions of the Federal Constitution the will of the people of the United States as expressed in the Constitution of the United States.

There being no inhibition in this matter in the Federal Constitution, it has been in so many words determined by this court that

> "Whether the legislative, executive or judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may in respect to some matters exert powers which strictly speaking pertain to another part of government, is for THE DETERMINATION OF THE STATE, and in its determination one way or the other cannot be an element in the inquiry whether or not the due process of law, prescribed by the 14th Amendment, has been respected by the State or its representatives when dealing with matters involving life or liberty." Language of Justice Harlan, giving the unanimous opinion of this court in Dreyer *vs.* The People of the State of Illinois, 187 U. S., 84 (1902.)

Thus fresh from the lips of the court which we address has been uttered its conclusion on two of the questions raised here.

(1) The one as to the validity of the Virginia Constitutional Court, and

(2) The other affirming the absence of the question of due process of law prescribed by the Fourteenth Amendment of the Federal Constitution.

When this conclusion has added to it the conclusions of the Supreme Court of Appeals of Virginia affirming the validity of the Virginia Constitution and specifically confirming the validity of the Constitutional Court created thereby, the respect habitually accorded by this court to the decisions of the highest tribunal of a State with respect to its own constitutional and statutory law, forecasts what must be its conclusion in this controversy.

It is the settled practice of the United States Supreme Court to confirm and follow the construction of constitutions and statutes as made by the highest court of a State.

> "The construction given to a statute of a State by the highest court thereof is a part of the statute itself, and is as binding upon the Federal Courts of the United States as the text of the statute" (U. S. *v.* Morrison, 4 Peters, 124; Green *v.* Neal, 6 Peters, 291; Township of Elmwood *v.* Marcy, 92 U. S., 287; 2 Daniel Neg. Inst., §1525.

If there be an unbroken series of decisions by the highest court of a State as to the construction of the CONSTITUTION or the statutes of a State, the United States Courts accept and apply it in cases before it. Township of Elmore *v.* Marcy, 92 U. S., 291, Davis, J., saying: "As these concurring decisions of the court of last resort in that State are grounded on the construction of the Constitution and statutes, it is the duty of this court to conform to them" (92 U. S., 204).

And if the highest court of a State adopt new views as to the proper construction of such a statute and reverse its former decision the Federal Courts will follow the latest settled

adjudications (Leflinglock *v.* Warren, 2 Black, 599; Wade *v.* Travis Co., 174 U. S., 499).

In Railroad Companies *v.* Schutte, 100 U. S., 644 (1879), this court confirmed decisions of the Supreme Court of Florida, Chief Justice Waite saying:

> "The Supreme Court of the State has *three times* so decided in cases where the question was directly presented by the pleadings and apparently fully argued."

So the principles of the pending cases have been three times decided by the Supreme Court of Appeals of Virginia.

See also County of Henry *v.* Nicolay, 95 U. S., 625.

This court unanimously confirmed the conclusions of the Supreme Court of Wisconsin in Gilman *v.* City of Scheboygan, 2 Black, 510 (1862), Mr. Justice Swayne saying:

> "We forbear to examine the soundness of the conclusions of the Supreme Court of Wisconsin. They need no support at our hands. We could add nothing to what they have so well and ably said in vindication of their own views.
>
> "Acting upon the principle recognized in this administration in the earliest period of its history, this court considers it is bound, in cases like this, to follow the settled adjudications of the highest State court, giving constructions to the constitution and laws of the State."

The Constitution of the United States Does Not Prohibit Admixture of Powers by the United States or by a State.

The Constitution of the United States contains no prohibition of the admixture of executive, legislative, and judicial powers in the same body, but on the contrary created a Senate which gives to one and the same body—

(1) The law making power;

(2) The treaty making executive power;

(3) With full share in the executive appointing power, and, at the same time

(4) Creates it a court of the highest jurisdiction which can try presidents and judges and dismiss them from office.

It would seem indeed a paradoxical uprooting of our ancient and long preserved system of government, and would at the same time be a slur upon the Constitution of the United States, as well as upon that of Virginia, to hold that in this case the Virginia Court must be set aside on the ground that it contains powers which are not consistent with the Federal Constitution that says never a word against their commixture, but on the contrary freely commingles them in one and the same body.

V.

WHAT IS A COURT?

A few citations may be properly added to the exemplification of a perfected court, and its exposition by the Supreme Court of Appeals of Virginia.

The term "court," as applied to the tribunals of England and the United States, is derived from the fact that the

"*curia*," or court, in England was originally held by the King himself.

When the King ceased to hold the court in person and delegated the function to an officer the character of the judgment was the same; and judgments read as the judgments of the King.

The establishing of a court and the investing of its officials with judicial power is the act of sovereignty. From no source but sovereignty can the judicial power be derived.

In this country, the sovereignty, which in England was vested in the King, resides in the body of the people, with respect to the persons and things which come within their jurisdiction.

Courts sit as the representatives of the sovereign power to deliver true judgment on cases made.

In this country "We, the People," are King.

Coke tells us that *curia* (court) is derived *"a cura, quia in curiis publicis curas gerebant"* (Coke, Litt. 58*a*). "Cura" means "concern," "affair," "care"; and the public cares, which it was originally the office of the King to "care for," have given their name to the court to which he, and then Parliament, commanded them. "Courts" are judicial "caretakers" of justice.

The Constituent Parts of Courts.

A court consists of at least three constituent parts; the *actus, reus,* and *judex.*

(1) The *actus,* or plaintiff, who complains of any injury done;

(2) The *reus,* or defendant, who is called upon to make satisfaction for it;

(3) And the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising from the fact, and, if any injury appears to have been done, to ascertain, and, by its officers, to apply the remedy (3 Bl. Comm., 25; People *v.* Van Allen, 55 N. Y., 31-35).

This is evidently a court in practical operation.

The officers of a court, such as clerks, sheriffs, marshals, sergeants, bailiffs, tipstaffs, constables, commissioners, etc., are such as may fitly keep its records (when it is a court of record), and execute its process. To interfere with them in any of their duties is "contempt of court," and a practical paralysis of their business, and a derision of the sovereign whom them serve.

A Place for Sessions.

A *place* for its sessions is essential to a court, and the sessions must be held at the time appointed by the law of the court's creation, and so while in the ancient days the King was regarded as the fountain and dispenser of justice, and wherever he was domiciled was a court or place where justice was dispensed. In modern times and under our form of government the judicial power is exercised by means of courts. "* * * A time when, a place where, and persons by whom judicial functions are to be exercised, are essential to complete the idea of a court. It is in its organized aspect, with all these constituent elements of time, place, and officers, that completes the idea of a court in the general legal acceptation of the term. But a court may exist in legal contemplation, without any officers charged with the duty of administering justice" (White County *v.* Gwin, 136 In-

diana, 562; "'CYC.' of Law and Procedure," Vol. 11, 653, 654).

Chief Justice Holt said in Groenvelt *v.* Burwell, 1st Salk., 200, that "wherever a power is given to examine, hear and punish it is judicial, and they in whom it is reposed act as judges; and wherever there is a jurisdiction organized with power to fine and imprison it is a court of record, and what is there done is matter of record."

Blackstone says that a court is defined to be a place where justice is judicially administered (3 Bl. Comm., 23). And he makes the observations, from which we must realize that in the presence of a court we are in the presence of the sovereign power: that we must conduct ourselves rightly, lest that power be exercised to fine or imprison us; and that the judges, who are the representatives of that sovereignty, cannot be restrained by any other power from the administration of *that justice* which it is their function to dispense.

"As by our excellent constitution," he says, "the sole executive power of the law is vested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown. For, whether created by act of parliament, or by letters patent, or subsisting by prescription (the only methods by which any court of judicature can exist), the king's consent in the two former is expressly, and in the latter impliedly, given." "And," he adds, "in all these courts the king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative."

The People Sovereign.

The United States of America follows this analogy in its institutions. "We, the People of the United States," are king. We ordained the Constitution of the United States, placed therein explicit statement of the powers granted to its servants, and explicit limitations upon those servants and upon the States.

"We, the People of the United States," in so many words provided in the Constitution, article X: "The powers not delegated to the United States by the Constitution nor reserved to the States respectively, or to the people."

"We, the people," of each State are the kings of the respective States to which we belong. As such we can do nothing that the sovereignty or kingship of the whole United States have forbidden in the Federal Constitution. Outside of that we are free and may do anything.

State Corporation Commission of Virginia Fulfills Every Definition of a Court.

The State Corporation Commission fulfills every definition and description of a judicial court ever given by any juritical expounder of or any intelligent commentator on the jurisprudence of the English-speaking peoples.

It is impossible, and has not been attempted, to point to a single feature lacking in its architecture or powers as a court of judicature.

It will be difficult to conceive of a tribunal more wisely framed to conduct the business of fixing a rate for transportation nor one that bore upon itself a clearer evidence of design to be fair, considerate and just to all parties interested.

When we look at the action of the commission which is intrusted to execute the design of the State, it becomes clear that it has acted with the utmost dignity, prudence, care and intelligence to put in practical operation the theory of its existence. Not one word has been said in criticism of its conduct, and its actions have disclosed all the features that command respect and confidence.

VI.

Due Process of Law—A Few Citations.

Often has this court pointed out and lamented in its decisions the proneness of the lawyers for litigants before it to plead lack of "due process of law" or of "equal protection of the laws" in their briefs, although they plainly existed There could not be a more flagrant case of such pleading than is found in those records. But pertinacity can neither supply law or fact.

Never could there be found a more pert illustration of due process and equal protection than is found in the provisions of Constitution and law alike than is found in the Virginia case for which we plead.

We will not quote the multiplied decisions. Let a few suffice.

Judge Miller in his lectures on the Constitution declares what due process of law is, in the meaning of the Fourteenth Amendment—

> "Is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

He cites approvingly Leeper *v.* Texas, 139 U. S., 462, in which case Justice Fuller, giving the unanimous opinion, declared that due process is secured—

> "By laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Hon. John Randolph Tucker in his work on the Constitution says, in volume II, section 390:

> "What, then, is due process of law referred to in this section of the amendment? What even in the regular administration of law in a State is general and impartial on all persons is due process."

He cites Walker *v.* Sauvinet, 92 U. S., 90, and Caldwell *v.* Texas.

Due process is simply that kind of procedure which is suitable and proper to the need of the case and sanctioned by established customs and usage.

Undoubtedly, rates may be fixed in several ways:

(1) By the corporations themselves, subject to inquiry by the State.

(2) By the Congress or the Legislature of the particular State.

(3) Boards or commissioners, under the authority of the United States, in their proper sphere, or of each State in its domestic sphere.

This third fashion "is no new thing," as said by the Supreme Court, and has been resorted to in England and in many States of the Union (I. C. C. *v.* Cincinnati R. R., 167 U. S.),

If these Commissioners be judges it does not affect this principle.

The State Corporation Commission acts not by the delegated people of Virginia on the authority of the General Assembly, but by the Constitution of Virginia itself, as ordained. That constitution has expressly declared that "the authority of the Commission (subject to review on appeal, as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws" (section 156 (*b*), Virginia Constitution).

The only inhibition upon the State is that contained in the Fourteenth Amendment, which requires—

(1) That no State can deprive any person of life, liberty, or property without due process of law.

(2) Nor deny to any person within its jurisdiction equal protection of the laws.

Due Process.

Due process of law is nearly, if not quite, equivalent to the term "law of the land," which was used in Magna Charta, and which was well known in England before the Great Charter of 1215, granted by King John, upon the demands of the barons of Runnymeade. The Constitution of the United States is undoubtedly the law of the land for the whole Union, and the constitution and laws of this State are the law of the land for Virginia, also, except in so far as they may possibly conflict with the Federal Constitution.

Due process does not require that the same identical proceeding be taken in all cases, or class of cases, as in another, or that the same judges shall hear one case, or class of cases, who have heard those of a different class.

We have courts to decide criminal causes; courts to hear cases at law, and courts to hear cases in equity. The methods vary as do the subjects, for as Story says "different principles are applicable in different cases, and require different forms of proceedings." He says also "that due process of law in each particular case means such an exercise of the powers of government as settled maxims of the law permit and sanction, and under such safeguards for the protection of the individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."

Due process of law and the equal protection of the laws having been manifestly administered by Virginia, no hand can legally or righteously be laid upon her or upon the court constituted by her sovereign power.

It was without the jurisdiction of the United States Circuit Court of the Eastern District of Virginia to enjoin the Virginia Commission Court.

It is beyond the jurisdiction of this court to assume that jurisdiction, for no court can interfere, nor is it subservient to any good end to attempt it at this time, for there is a plain, broad road, well paved by law, to come here by due process of law; that due process is by appeal to the Supreme Court of Appeals of Virginia from a case finally adjudicated, if there can be revealed any Federal question that should come here.

VII.

Rate Making.

Philosophically, grammatically and historically, the rate making power may have been styled a legislative power or administrative power. This was for the reason that the legislature usually controls the manner in which schedules or rates may be made.

But in the United States, in Virginia and everywhere else neither the Congress nor any State legislature has ever undertaken to fix schedules or rates.

The legislative power is exercised by Congress and usually in States by the legislature to prescribe the manner in which rates may be fixed by those upon whom the rate making power upon particular corporations and particular parties is devolved.

Rates made be made under legislative authority approved by the chief executive—

(1) By directors of corporations upon legislative authority.

(2) By the receivers of corporations through judicial authority when courts have taken jurisdiction of the corporation.

But there is no reason in law why the United States, or any of its States, should not by constitutional ordinance prescribe how and by whom rates may be fixed.

Why Courts Have Not Ordinarily Fixed Rates.

There are several obvious reasons why the courts have in past years spoken of the fixing of rates as a legislative or administrative function.

(1) Such was the plain matter of fact, as in all corporations, the duty of fixing them was devolved upon the directors, the natural agency of administration.

(2) When complaint was made of the rates fixed by the directors, as a rule there was no authority in the courts to fix what rates should be, but only to decide against those not reasonable and just.

(3) Neither the courts of common law or equity had ever dealt with such matters; there was no common law or equity jurisdiction to fix rates, if we except here the cases in which the transportation companies had been thrown into the hands of receivers. In such cases the directors being superseded, and the receiver of the court having control of the matter, might, under the instruction of the court, do what to equity might seem just as to rates.

(4) There being no customary common law or equity jurisdiction on the subject, it was not contemplated that courts should fix rates, and they were not provided with the conveniences of administration to fix rates. This is a historical view of the subject into which has been introduced now the new feature of transportation corporations sometimes making rates not justified, and there has been universal call for a remedy.

Jurisprudence is not a dead science, nor is the sovereignty of the people a dead thing. Under pressure of the conditions related, some of the States have made the fixing of rates a judicial function for the correction of evils brought about by maladministration. The fixing of rates involved judicial ideas as well as administrative ideas. It is a plain fact that there are many things originally in their nature purely administrative which may be made matters of judicial

examination and correction: and especially is this true with respect to those things which may be dealt with by a general decree of a court laying down broad lines to be executed in detail by the actual administrative hands moved by the court. The judicial faculty of the mind must be exercised to say what is an unreasonable rate, and hence it is universally recognized that courts have jurisdiction in proper cases to do this. It is self-evident also, that judicial faculties must be exercised to say what will be a reasonable rate upon the given state of facts with respect to situation and conditions. The Supreme Court of the United States, and indeed all courts, have to a degree, exercised this faculty, and have laid down the rule that a reasonable rate must be one that gives a reasonable compensation, conditions and situation considered.

What is a reasonable compensation? By process of elimination, the courts have said that certain compensations are reasonable and certain compensations unreasonable, and when there is a case before a court which requires a categorical answer, what is a reasonable compensation, in this case there can be no ground in the nature of things for a declaration that a court may not be given the power to do it. It is not necessary for a State to preserve the trial by jury in its jurisprudence, as has been held by the Supreme Court of the United States. Neither can it be necessary for a State to require that the answer to the question, what is a reasonable rate, in this case be determined by a jury, by an administrative body, or by any other particular selection of persons; and if a law of the State devolves upon a judge or judges the duty to answer that question, there is no inventive faculty of the human mind that can detect a reason in the Constitution of the United States why it may not do so.

The Fixing and Adjudication of Rates.

The fixing and adjudication of rate and freightage cases has always been a matter specially dealt with in the jurisprudence of the English-speaking people.

Until the adoption of the Fourteenth Amendment it was not supposed that the statutes regulating the use and service of private property necessarily deprived one of his property without due process of law. That Amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such deprivation. And furthermore, we learn from the common law that when private property is affected with the public interest it ceases to be *juris privati* only.

"Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large." This was declared by Lord Chief Justice Hale over 200 years ago, and remains undisputed. (Waite, C. J., Munn *v.* Illinois, 94 U. S., 113.)

It is true that ordinarily, that is to say, before the common law and equity courts of the country, an ascertainment of what is a reasonable rate is regarded as an administrative question, and is not one to be ascertained by the court.

The courts of general jurisdiction at law and in equity are not so constituted as to go with convenience into the long and intricate inquiries which are indispensable for the ascertainment of what is a reasonable rate.

The *argumentum ab convenienti* has not had its weight in inducing ordinary courts known to the Federal Government to hold that it is not for them to ascertain what is a reasonable rate for the future. They look only to ascertain

whether a rate administratively fixed is within the bounds of the Fourteenth Amendment, and if they conclude that it is unreasonable, that is to say, unjust, in fixing a rate so low as to be confiscatory of the property subjected to public use they hold it void. The matter then recurs to the rate-making power to fix a rate that is not confiscatory.

It is for this very reason that the State of Virginia has wisely constituted a judicial body that—

First, looks into the question of rate, and prescribes what seems to it to be reasonable. In doing this it does not conclusively fix a rate, but only tentatively proposes it. This is the initial proceeding, like that of a judge who issues a rule against a person or party to show cause why he be not fined for contempt.

Second, the same body then issues a summons to the corporation affected by the rate to show cause, if any it can, why such rate should not be prescribed.

On this inquiry arises the full and final judicial hearing, and the same body that has proposed a rate now investigates the question in the light of any evidence that may be adduced for or against it, hears arguments of counsel on both sides, and adjudicates the question upon evidence submitted and not upon any previous predilection concerning it.

Not only may legislative bodies, such as Congress or the legislature of a State, delegate its powers to such persons as it may select and determine the facts according to which a legislative proposition may become a law or otherwise, but they may also delegate to courts certain powers to make rules and regulations, and execute the law ascertained.

> "It cannot be contended," said Chief Justice Marshall in the year 1825, in the case of Weyman *v.*

Southard, 10 Wheaton, 42, "that Congress can delegate to courts or to any other tribunals powers which are

STRICTLY AND EXCLUSIVELY LEGISLATIVE,

but Congress may certainly delegate to others powers which the legislature may rightfully exercise itself.

"Without going further for examples, we will take that the legality, of which counsel for the defendants admit, the seventeenth section of the judiciary act and the seventh section of the additional act empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules demanding the return of writs and processes, the filing of declarations and other pleadings and other things of the same description. It will not be contended that these things might not be done by the legislature without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judiciary department."

VIII.

Intermixture of Powers in Virginia.

This is by no means the first instance in which the State of Virginia has devolved upon her courts the duties of all three departments of government at one and the same time. The old county court fixed the price of lodging and refreshment, and attended in general to the multifarious county affairs. County courts were a part of the judiciary system to try all manner of cases the State deemed proper to admit to its jurisdiction, and to regulate the affairs of public utilities as well. Indeed, he must be little conversant with the history of that

State not to know that from the very beginning of its existence it has intermingled and commixed the three powers of government as to it seemed best, and without challenge from any judicial source whatsoever.

Intermixture of Powers by the First Constitutional Convention of Virginia.

The first constitutional convention of Virginia was composed of 45 of the Colonial House of Burgesses. It assembled at Williamsburg, Va., May 6, 1776, adopted the Bill of Rights framed by George Mason on June 12, and adopted Virginia's first constitution (without submission to the people) on June 29.

The Bill of Rights was not a part of the constitution, but its declaration that "the legislative and executive powers of the State should be separate and distinct from the judicial" has been often quoted in affirmation of that doctrine in a sense not meant or interpreted by its authors.

That the very convention that initiated the Bill of Rights did not regard this separation as anything more than the declaration that there should be three separate departments of government is abundantly proved by the fact that the Constitution framed and proclaimed by it freely commingles these powers.

For instance:

First. The governor was to be chosen annually by joint ballot of both houses, thus placing the power of appointment of the chief officer of the State in the hands of the single House of Delegates.

Second. The two houses of the Assembly shall by joint ballot appoint judges of the Supreme Court of Appeals and

general court judges, judges in chancery, judges of admiralty, secretary, and attorney general, to be commissioned by the governor, and to continue in office during good behavior.

Thus the legislative bodies were made the creators by appointment of the whole judiciary, except inferior courts.

Third. The Privy Council, or Council of State, consisting of eight members, shall be chosen by joint ballot of both houses of the General Assembly, either from their own members or the people at large, to assist in the administration of the government. They shall annually choose out of their own membership two, who, in the case of death, inability, or absence of the governor from the government, shall act as lieutenant governor.

Fourth. The governor, with the advice of the Privy Council, shall appoint justices of the peace for the counties. Thus, in the minor judicial officers, the chief executive exercised the executive authority which as to the greater ones was exercised by the legislature.

Fifth. The judges shall hold their offices during good behavior, to be judged and determined in the general court.

Sixth. The sheriffs and coroners shall be nominated by the respective COURTS, approved by the governor with the consent of the Privy Council.

Here the courts were given the executive power of nomination subject to approval by the chief executive authority, the governor, whose approval, in turn, was to be given with the advice of the Privy Council.

It is quite obvious that this first constitution of the first State of America, which antedated in its adoption by five days the Declaration of Independence, utterly spurned and wholly ignored the notion now urged upon this court that

a merger in one body of legislative, executive, and judicial powers created an unrepublican form of government.

County and Corporation Courts of Virginia Made Examinations Respecting the Accused, and then Tried Him.

County and corporation courts of Virginia were for a long period and until after the civil war examining courts with respect to both misdemeanors and felonies.

Eight justices, if as many there were, of the county or corporation court in which the accused was committed were summoned at the court-house to make the examination. Upon such examination, if it appeared to the court there was not PROBABLE CAUSE for charging the accused with the offense he was to be discharged. If the accused were a white person charged with a felony, or a free negro charged with felonious homicide, or any offense punishable with death, and it appeared that a felony had been committed, and that there was PROBABLE CAUSE to charge the accused therewith, the examining court was required to remand him for trial in the circuit court having cognizance of the case.

If the examining court were of the opinion that the accused was guilty of a misdemeanor for which he ought to be tried in the county or superior court he was to be let to bail or committed to jail to answer an indictment against him in such court (Code of Virginia, 1860, page 827).

The Supreme Court of the United States holds two things:

First. That the separation of powers is in general a matter of local law.

Second. That it is not properly cognizable under the due process of law of the Fourteenth Amendment.

On this subject it has said:

> "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government is for the determination of the State.
>
> "And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty." (See Dreyer *v.* Illinois, 187 U. S., 71-84; see also 194 U. S., 445.)

Judicial Officers from Time Immemorial Intrusted with the Discharge of Executive or Administrative Functions.

As it has been found impracticable in the construction and operation of our American governments to exclude from the legislature certain administrative features, and from the executive certain legislative features, so it has been found inexpedient to exclude from the judiciary all participation in executive or legislative functions.

"In many instances," says Prof. Goodnow, of Columbia College, in his work on Administrative Law, "the needs of government make it seem advisable to intrust the courts with functions somewhat administrative in character."

He shows that "in the commonwealths of the United States and England, where the exceptions to the local adoption and application of the Federal separation of powers are numerous,

judicial officers from time immemorial have been intrusted with the discharge of executive or administrative functions."

Goodnow, Vol. 1, page 30.

Walter Bagehot, the brilliant writer of a book on the English Constitution, says, "No doubt by the traditional theory as it exists in all the books, the goodness of our Constitution consists in the entire separation of the legislative and executive authors, but in truth its merit consists in their singular approximation." (Page 76).

And he gives it as his opinion that "The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers." (Page 76.)

IX.

Injunction. The Statute.

For one hundred and fifteen years injunction has been forbidden the Supreme Court of the United States or any other court "to stay proceedings in any State court," except where the Federal Court was of concurrent jurisdiction, and had assumed it prior to the State court.

For one hundred and fifteen years no injunction has been permissible to stay proceedings IN ANY STATE COURT.

George Washington as President of the United States approved on March 2, 1793, an act of the Second Congress in addition to the act entitled "An Act to establish the Judicial Courts of the United States."

In that act it was forbidden (section 5, volume 1, U. S. Statutes at Large, pp. 334, 335) amongst other things, that:

"No writ of *ne exeat* shall be granted unless a suit in equity be commenced and satisfactory proof shall be made to the court or judge granting the same that the defendant designs quickly to depart from the United States:

"(1) NOR SHALL A WRIT OF INJUNCTION BE GRANTED TO STAY PROCEEDINGS IN ANY COURT OF A STATE" (section 5).

"(2) Nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same."

The Interdict and Judge Pritchard's Opinion.

As the interdict of injunction on any court now stands it is expressed in the Revised Statutes of the United States as follows:

"SEC. 720. *Injunction to Stay Proceedings in State Courts.*—The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

See the decision on this section later.

Judge Pritchard says in his opinion granting the injunction that—

"It is true that the Court of Appeals of Virginia has held that the Corporation Commission of Virginia possessed judicial, executive and legislative functions.

"Nevertheless I am of *opinion that in fixing the rates involved in this controversy the Corporation Commission was exercising a* LEGISLATIVE FUNCTION,

and therefore was not acting as a court within the meaning of Sec. 720 of the Revised Statutes, and its acts in attempting to put in force the rates thus established are administrative.

"Under these circumstances, this court has jurisdiction to restrain the defendants from publishing and enforcing the rates which have heretofore been prescribed and established by said Commission. The acts sought to be restrained being purely ministerial in their character, the complainant seeks to assert a right which is guaranteed by the Constitution of the United States and it thereby becomes the duty of the court to entertain jurisdiction in order that the reasonableness of such rates may be judicially determined" (C. & O. Record, p. 678; Rec., pp. 155-6).

The opinion of Judge Pritchard that the Commission was exercising a "legislative function" and therefore was not acting as a court, within the meaning of Section 720 of the Revised Statutes, is novel and far-fetched.

The people of a State had created and appointed this Commission to do exactly what it did, and had created it as a court that it might best do it. They alone could exercise THEIR SOVEREIGN POWER, or delegate it. So has this court determined (187 U. S., 71). They delegated none of it to any other judges than those selected by and under its own Constitution, and that as matter of right.

It is a self-evident fact, from the structure of the Commission, its proceedings and the construction thereof by the Supreme Court of Appeals of Virginia, that:

(1) The Commission was not assuming any legislative duty that belonged to the General Assembly of the State, which is its general legislative body.

(2) In undertaking to make rates it was doing what is usually devolved by a State upon directors of corporations through the legislature, and upon receivers of corporations through courts having jurisdiction of them.

Even if in other States legislatures usually exercise such a duty, it is expressly decided, as we have already shown that the States are not forbidden by the Constitution of the United States to distribute their legislative, executive and judicial powers upon different bodies nor concentrate them in the same body.

The Commission Not a Parliamentary Body.

The Commission as set forth in the constitution and laws of the State has no legislative powers. It can enact nothing. It is not a parliamentary or legislative body in any sense. Do not let us confuse historical and grammatical things with constitutional facts of Virginia now.

It is true that courts sometimes speak of rate making as a legislative power, and sometimes as an administrative power. So it may have been in the cases in which the term was used, either by the direct act of the legislature or by an agency established by the legislature with the delegated power to act in its stead. It is too late in the jurisprudence of this country to debate the well settled principle that such a procedure is entirely competent. But in this case the Commission Court of Virginia is a constitutional body and has conferred upon it direct by the people through their constitution makers, the power to adjudge and decree a rate after full hearing. It is a judicial power, its exercise being immediately appealable, and its record presentable to the Supreme Court of Appeals by appeal as a matter of right.

The same rate making power is conferred upon the Supreme Court of Appeals when it hears the appeal from the Commission. The only other powers conferred upon the Commission are the administrative or executive powers usually conferred upon Commissions. It is a plain fact that only these two powers are conferred upon the Commission with such executive or administrative powers as generally pertain to courts to designate and direct their own officers.

Legislative, Executive, and Judicial Powers Combined in Every English Speaking State or Nation.

There is not an English speaking State or nation in the world in which there is not some admixture of executive, legislative and judicial powers in one person or body.

It is an historical fact that the Federal Constitution and the constitutions of each and all of the States have commingled legislative, executive, and judicial power, and bestowed all three of these distinctive features of government upon one or more of the separate departments.

It is also a legal and judicial fact that it is for the State and for the State alone to determine the instances in which it will keep the three respective faculties of government separate and in which it will commingle them.

No power has ever been deemed to exist in the Federal Government or its courts, to denounce or annul the action of any department of the State government, upon the ground that one of the same persons or one of the same bodies has ascribed to it by the State legislative, executive, and judicial powers.

There are a great number and variety of cases in which these faculties of government have been commingled in the

States, and if now the idea were invented that the person or body possessing the three separate powers must fall before judicial decree, universal confusion would result and the whole country would have to go to work to reframe its institutions.

Montesquieu was a Frenchman. He was of the French—frenchy—of a people that has never builded such a constitution, or such institutions as those that are the product of our race. In the "spirit of the laws," he has misled the shallow readers of jurisprudence, and has in some instances created the impression that it is fundamental to separate the three powers of government in all respects and with precision. The fact is, it never has been done, and in all likelihood never will be, for in the nature of things it is impracticable to separate them altogether. The corollary is equally true for the sovereign power that creates its own institutions.

The fact is that even Montesquieu himself did not conform to his own theory, but on the contrary supported the idea of the executive veto which puts it in the power of a single man to annul legislation, thus giving to the hands of one man power to veto the lawmaking power of the government. Besides he held up the English Constitution to admiration with all its intermixture of powers.

While his theory had an acceptance with some, and is stated as almost a political maxim, it was pared away or ignored as soon as the deft hands of constitution makers were practically employed in the construction of durable works.

While his theory had and is stated as almost a political maxim, it was pared away or ignored as soon as the deft hands of constitution makers were practically employed in the construction of durable works.

The most accomplished of the writers on administrative law—that is, Prof. Goodnow, of Columbia College, New York—has taken to pieces the fine-spun theory of the brilliant essayist and philosopher. He admits the large influence of the Montesquieurean theory, but justly regards it as lacking in both scientific and practical foundation, and he shows the many exceptions that exist to it, and how they differ in different States.

Goodnow on Comparative Administrative Law, Vol. 1, pages 20-21-22.

"The union of legislative, executive, and judicial duties and powers of government in any one body or official, constitutes all the elements of despotism."

"It is despotism," so some say.

This, literally taken, is simply a rediscovery of America; some famous Columbus of the law, who, in such an overreaching sentence has assumed that the sea weed of France is the dry land of this continent.

If otherwise, the United States has never yet breathed a single breath of the fresh air of freedom.

Admixture of Executive, Legislative, and Judicial Powers in the Senate of the United States.

Look at the American Senate:

(1) It has all the legislative powers co-ordinately with the House of Representatives—that is, very full legislative powers—except that it cannot originate a bill for levying taxes.

(2) It has the highest judicial power known to any court in the land, for it alone can try impeachments of the President, the Supreme Court and other judges, and the officers of the United States.

(3) It is also the judge of the election and qualification of its own members, and may at any time vacate the representation of a State.

(4) It shares the highest executive faculties of the President, and only by its advice and consent can a judge, an ambassador, or any other officer of the Government of the United States be appointed.

(5) So it shares with the executive the treaty making power.

If the theory advanced here be correct, the attorneys who are attacking the constitutionality of the Constitution of Virginia should also attack the Federal Interstate Commerce act on the ground that the Federal Constitution is itself unconstitutional; that we have not a republican form of government in the law making department of the Union, that our structure, which is the admiration of the world, is after all the mere invention of autocracy, absolutism and despotism; and that the Supreme Court of Appeals of Virginia must be swept away with the junk now to be made of the treasured riches of centuries. The barbarians who broke up the statuary of conquered Rome and flung it in the rock piles will have become the rude reformers' models. A revolution would be the remedy for the ill complained of, if conservatives did not faint

at such a suggestion. A judicial revolution, perhaps they would say, and if it occurred it would be exactly on the ground of the briefs of counsel in this case who are seeking to overturn the Constitution of Virginia.

To Abraham Lincoln is attributed the saying that "you can fool some of the people all of the time, and all of the people some of the time, but you cannot fool all the people all the time."

If the Montesquieurean theory of our able opponents in this case be correct as to our despotisms in this country, the whole people of the United States have been fooled ever since the Federal Constitution was adopted *all the time*, and have basked in the illusion that they had a free government. All the people in Virginia have been fooled all the time ever since the Bill of Rights and our first American Constitution were adopted, in 1776, for the Constitution itself negated the Bill of Rights, as our opponents construe it, and ushered in a reign of despotism which has its citadel at this time in the Constitution which ordained the Corporation Commission.

The Constitution of a State is greater than the officials created at its behest, for it is the express utterance of the sovereign people. Its construction by the Supreme Court of Appeals of the State which creates it is more authoritative than any other.

There is nothing in the Constitution of the United States that either expressly or impliedly prohibits the intermixture of legislative, executive and judicial powers in the Federal Government, or in constitutional grant by the State to any of its departments. Free and unfettered as to the architecture of its own institutions, the State may fashion them according to her own free and untrammeled will, provided

only that she does not violate the limitations made by the people of the United States in their Constitution on the peoples of the States as expressed in their constitutions and laws.

X.

The Demurrer.

Briefly stated, the demurrer is based upon the grounds:

(1) The plaintiff has stated no case.

(2) That the defendant has no personal or individual interest in the matters and things referred to.

(3) The plaintiff has adequate remedy at law.

(4) That this is a suit against Virginia, and the court has no jurisdiction.

(5) The subject-matter is *res adjudicata*.

(6) There is no jurisdiction here, for the reason that the State Corporation Commission is a court forbidden to be enjoined.

(7) That if legislation instead of a judicial proceeding, this court cannot enjoin it before enactment.

These questions will be considered with the application of authorities that override the complainant's bill and render it without jurisdiction and wholly untenable here. We shall not discuss the impairment of contract urged by some of the companies defendant below, and appellees here, with respect to the anterior Virginia statutes which it is insisted limited the power of the State.

My learned colleagues will do that in so far as they deem it desirable. But evidently the positions put forward in the argument eliminate this question from courts that have no

jurisdiction here to intervene in this case at all, and from litigants who had full remedy by appeal.

Complete and Adequate Remedy in Process.

The appellees here had a complete and adequate remedy. It is now in process suppressed in its due course by an illegal injunction. It was much better calculated to bring about the final solution of the controversy than the one which they devised. An appeal to the Supreme Court of Appeals of Virginia was theirs of right, and when that tribunal had entered its decree they might have directly appealed to the Federal courts, if they deemed themselves aggrieved thereby.

This was the main plain and paved road before them. They intimate that it was designed to avoid the jurisdiction of an inferior Federal court. If such would have been the effect of the proceedings, they had an appeal to this tribunal as the result of that avoidance, and it cannot be said that either party would be at a disadvantage here. It is plain on the other hand that the complainants below did desire to avoid the jurisdiction of the Supreme Court of Appeals of Virginia. These are all Virginia corporations; from Virginia they received their franchise, and from her the right to exercise her own supreme power of eminent domain to construct their railroads upon the lands of her citizens whether with or without the consent of her landed proprietors. On some of the railroad litigants the largest of Virginia has been disbursed. Not a dollar from the United States. Having used her sovereign powers for their own behoof, and avoiding the high tribunal that the State ordained and gave them the right to resort to, they cannot improve their status in this tribunal by the empty accusation that we, who are

now seeking relief under the Federal jurisdiction, desired in any way to impede their proper exercise of all their rights under the laws of the land.

Res Adjudicata.

The Circuit Court, while the order of publication was being made and had several times been published, interjected into the case with its injunction.

Clearly the Corporation Commission had assumed jurisdiction, and in so far as considering, hearing and issuing the order or decree, the case had been adjudicated. The case was finished, so far as it could finish a mechanical thing which required four weeks to complete it, but was cut short by the interjection of the injunction.

When once a court of concurrent jurisdiction has taken hold of a case it cannot be stopped by injunctive process, and when a court has made its decision it becomes in law an adjudicated thing.

XI.

Supreme Court and Other Federal Decisions Against Injunction in Such a Case.

The Supreme Court of the United States and the other Federal courts have repeatedly affirmed the doctrine that no court of the United States can enjoin proceedings in a State court, with the single statutory exception made by the national bankrupt law when such law is in operation; and the further exception taken from equity principles in the case of concurrent jurisdiction, that the Federal court had assumed prior jurisdiction.

The Revised Statutes, section 720, and the rules of comity that obtain in concurrent jurisdictions apply alike the doctrine that prohibits Federal jurisdiction to interfere in the proceedings of the State Commission-Court.

Citation of Federal Cases Against Injunction.

In Diggs & Keith *v.* Wolcott, over one hundred years ago, it was held that the Circuit Court of the United States had not jurisdiction to enjoin proceedings in a State court. (4 Cranch, 179 (1807).)

In Peck *v.* Jenness, 7 Howard, 612-625 (1849), *these propositions were promulgated by this court. They rest on comity and necessity.*

> I. "That where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court."
>
> II. "That these rules have their foundation, not merely in comity but necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable for a process for contempt in one, if they dare to proceed in the other."
>
> III. "That a suit rightfully instituted in a State court before the institution of proceedings in a court of the United States cannot be arrested by injunction from any court of the United States. For if this be not so, our complex system of government cannot be upheld." Justice Grier gave the opinion.

Giving the opinion in the Slaughter-house cases, 10 Wall., 298 (1869), Justice Clifford declared that:

> "The words of Section 720 Revised Statutes, *'nor shall a writ of injunction be granted to stay proceed-*

ings in any State court,' APPLIES TO THE SUPREME COURT AS WELL AS TO THE CIRCUIT COURT."

In Watson *v.* Jones, 13 Wallace, 679 (1871), this court had before it a controversy involving a conflict between courts of concurrent jurisdiction. Such proceedings had been taken that the appellate court of Kentucky had made, but not enforced, an order to restore possession to the parties of property of which they had been deprived by a decree which had been reversed.

It was held (Judge Miller giving the opinion) that the Circuit Court of the United States could not enjoin the defendant, saying:

> "The act of Congress, March 2, 1793, as construed in the case of Diggs *v.* Wolcott (4 Cranch 179), and Peck *v.* Jenness, (7 Howard, 625), are equally conclusive against any injunction from the Circuit Court forbidding the defendants to take the possession which the executed decree of the chancery court requires the marshal to deliver to them."

In Haines *v.* Carpenter, 1 Otto, 91 U. S., 257 (1875), Mr. Justice Bradley giving the opinion of the court said:

> "The great object of the suit is to enjoin to stop litigation in the State courts, and to bring all the litigated questions before the circuit court. This is one of the things the Federal courts are expressly prohibited from doing. By the act of March 2, 1793, declared that a writ of injunction should not be granted to stay proceedings in a State court. THIS PROHIBITION IS REPEATED IN SECTION 720 OF THE REVISED STATUTES AND EXTENDS TO ALL CASES, EXCEPT WHERE OTHERWISE PROVIDED BY THE BANKRUPT LAW."

This objection alone is sufficient ground for sustaining the demurrer to the bill.

In such a case would also be applicable the case of Citizens Bank *v.* Board of Litigation, 8 Otto, 140, by Chief Justice Waite, said:

> "To give us jurisdiction under Section 720 Revised Statutes, it is not only necessary for some of the questions mentioned in the section to exist on the record, but that the decision was controlling in the disposition of the case."
>
> See also Williams *v.* Oliver, 12 How., 125.
> Klinger *v.* City of Mo., 13 Wall., 257.

In French *v.* Hay, 10 Wall., 253 (1874), Justice Swayne giving the unanimous opinion of this court, said:

> *"Prohibition in the judicial act against the granting of injunction in State courts, has no application here.* THE PRIOR JURISDICTION OF THE COURT BELOW TOOK THE CASE OUT OF THE OPERATION OF THAT PROCESS."

Chief Justice Waite, giving the unanimous opinion of this court in Bolling *v.* Lersner, 1 Otto 595, 91 U. S. (1875), declared that:

> "We cannot re-examine the judgment or decree of a State court simply because a Federal question was presented to that court for determination. To give us jurisdiction it must appear that such a question was in fact decided or that its decision was necessarily involved in the judgment or decree as rendered."

This was in expounding its appellate jurisdiction over the judgments and decrees of State courts, and might arise as a question in these cases after their adjudication by the Su-

preme Court of Appeals of Virginia, and might be applicable in an appeal from the Supreme Court of Appeals of Virginia.

In U. S. *v.* Collins, 4 Blatchf. 156, Paul, J., giving the opinion said:

> "The fifth section of the act of March 2, 1793, prohibits the courts of the United States from granting the injunction to stay proceedings in any State court. This stern proceeding may properly, and I think, MUST NECESSARILY INCLUDE ALL STEPS TAKEN BY THE COURT OR ITS OFFICERS UNDER ITS PROCESS FROM THE INSTITUTION OF THE SUIT UNTIL THE CLOSE OF THE FINAL PROCESS OF EXECUTION WHICH MAY ISSUE THEREIN."

The case of Fisk *v.* Union Pac. R. R. Co., 6 Blatchf., 362, was upon a case which had been removed to the United States Court for the Southern District of New York. That court declared that:

> "the State court regards the proceedings going on in this suit as null and void, but it is not to be assumed that the State court would undertake to restrain the defendants from carrying on such null and void proceedings. It has not done anything of the kind as yet, and it would doubtless regard such a proceeding as outside of its proper province. So far as appears to this court, the action of the State court in this matter has been entirely unexceptionable as respects this court or any action of this court."

The same words might be properly applied to the case at bar. The State has made no fight, save in the orderly course of procedure.

Judge Blatchford continues:

"Irrespective of the views already presented, if this court is an existing proceeding in the State court, this court is inhibited by the 5th section of Act of March 2nd, 1793 (the anti-injunction section) from granting an injunction to stay such proceeding. The statute indeed uses the words 'a writ of injunction,' but the spirit of it is that this court shall not in any manner stay proceedings in any court of a State. It is not an inhibition merely against issuing an injunction in the shape of a writ of injunction, mandamus, or prohibition, directed to the State court itself, but it has been construed always as an inhibition against staying a party from conducting such proceedings in a State court. Such was the view of this court in the case of The City Bank of New York *v.* Skelton (2 Blatchf. C. C. R., 14, 18), where this court was asked to stay a defendant from taking further proceedings in a suit which he had brought in a State court. This court says: 'There is an impediment to the enforcement of that principle by this court in the case now before it. One of the suits pending against which the plaintiffs ask relief, is prosecuted in the State Court of Chancery, and this court is clothed with no power to restrain or interfere with a suit so situated. A court of the United States, in executing a jurisdiction vested in it, may undoubtedly act upon parties who are suitors in a State court in relation to the same subject-matter, so far, at least, as to compel their submission to such judgment as the United States Court may render in a case of which it has cognizance. But, even then, it cannot interdict their prosecuting their suit in a State court, much less control any action pending in such court. It is understood that the State courts uniformly adopt the same doctrine in respect to

courts of the United States.' In the order made in that case, this court declared that the proceedings in the State court were not within the cognizance of this court, or subject to its control, and, therefore, it issued an injunction merely restraining the defendant from further prosecuting suits brought by him in this court, until the suit in the State court should be decided.

"It results, from these views, that, although this suit has been properly removed to this court, and is now pending here, it is not a proper exercise of the judicial power of this court to grant the order asked for. The motion is, therefore, denied."

The case of Fisk *v.* Union Pac. R. R. Co., 10 Blatchf., 518 (approved in Hamilton *v.* Walsh, 23 Fed. R., 420), was one in which the Federal court took jurisdiction before the State court, and Blatchford, J., said, the provisions of section 5 of the Act of March 2, 1793, that a writ of injunction shall not be granted to stay proceedings in any court of a State, has not been held to have, and cannot properly be construed to have, any application except *to proceedings commenced in a court of a State before the proceedings are commenced in the Federal court*, otherwise after such were brought in a Federal court, the party defendant could by resorting to a suit in a State court defeat in many ways the effective jurisdiction and act of the Federal court where it had obtained full jurisdiction of person and subject-matter.

Moreover, the provision of the act of 1793 must be construed in connection with the provision of section 14 of act of Sept. 24th, 1789, that the Federal courts shall have power to issue all writs that may be necessary for the exercise of their respective jurisdictions. It may properly be considered

as necessary for the continued exercise of the jurisdiction of this court over the corporation in question that it should be restrained from taking steps in the state court to put itself out of existence.

The case of Cropper *v.* Coburn, 2 Curtis, C. C. R., 469, the act of March 2, 1793, against granting injunction to stay proceedings in any court of a State, was before the eminent Judge Benjamin R. Curtis, and he held that the word "proceeding" may properly include all steps taken by the court or by its officers under its precepts from the institution of the suit to the close of the final process which may issue therein.

In Hamilton *v.* Walsh, 23 Fed. Reporter, 420 (1885), an action of replevin was pending in a State court, and the complainant filed a bill in the United States court to reform the mortgage under which he claimed.

After the suit in the State court had proceeded to final judgment for the defendant, he commenced suit on the replevin bond in the State court. The complainant then filed a supplemental bill in the Circuit Court of the United States for the District of Rhode Island, praying an injunction to restrain the suit on the bond until after final decree reforming the mortgage.

Carpenter, J., giving the opinion, said:

> "The statute, in terms, prohibits the granting of an injunction to stay proceedings in a State court, except when authorized in bankruptcy proceedings. Rev. St., sec. 720. This statute has been held, however, to apply only to *cases where the proceedings are first commenced in the State court.* Fisk *v.* Union Pac. R. Co., 10 Blatchf., 518; French *v.* Hay, 22 Wall., 250; Dietzsch *v.* Huidekoper, 103 U. S., 494.

> The complainant points out that the suit on the bond has been commenced since his original bill was filed in this court, and he claims that, upon the rendering of final judgment on the replevin writ, the State court ceased to have jurisdiction of the subject-matter, and that the proceeding in that court was at an end. I cannot agree with this view of the case. The action on the bond is for the purpose of enforcing, or perhaps more properly of securing, the fruits of the judgment in the replevin suit, and is the appropriate process for that purpose. It takes the place of the levy of a writ of execution in an action on the case, and it must for this purpose be taken to be part of the original proceeding in the State court."

In Chaffin *v.* St. Louis, 4 Dillon, C. C. R., there was a motion for a temporary injunction to cancel the decree of a State court and restraining defendants during pendency of the suit therein. The learned Judge Dillon disposed of the case by saying:

> "The complainant has amended his prayer for an injunction by striking out the words which ask that the city be enjoined 'from further prosecuting its said suit' in the State court, but notwithstanding this, it is evident to grant the injunction sought, would, if it were effectual for any purpose, be so only because it would in some way interfere with the progress of the litigation in that court. This a Federal court is prohibited from doing directly, for the Revised Statutes of the United States (section 720) enact that 'the writ of injunction shall not be granted by any court of the United States TO STAY PROCEEDINGS IN ANY COURT OF A STATE.' And on the case made by the bill, it is not justified in doing this indirectly, at the instance of a stockholder (Memphis *v.* Dean,

> 8 Wall., 64: Peck *v.* Jenness, 7 How., 612). The motion for the allowance of a provisional injunction is denied."

In McWhirter *v.* Halstead, 24 Fed. Reporter, 828 (1885), the Circuit Court of the United States for the District of New Jersey held that an attachment issued by the Supreme Court of New Jersey could not be interfered with by injunction. An action of trespass had been brought in the Rhode Island United States Court. The United States Circuit Court held, Nixon, J., giving the opinion, that there was no difficulty in granting the injunction against the plaintiff in that court, but said:

> "It is different in regard to an injunction against the parties to the attachment proceeding in the State court. They are there pursuing the remedy given by the law against the property of a non-resident debtor, and section 7, Revised Statues, expressly prohibits a court of the United States from issuing the writ of injunction to stay proceedings in any court of the State except where the injunction may be authorized by any law relating to proceedings in bankruptcy."

In Hale *v.* Bugg, 82 Fed. Reporter, 33, Cir. Ct. W. D., Ark., had before it in 1897 the question of comity between courts of different States. Judge Rogers, giving the opinion, said:

> "Mr. Beach, in his work on Receivers (paragraph 20), after discussing the comity between courts of different States and courts of coördinate jurisdiction in the same state, says:
>
> " 'The same principle of comity which has already been noticed as actuating the settlement of similar questions between courts of different States has been

invoked for their determination, until the rule is now well settled by the practice of the courts, under both systems, that the court which first acquires jurisdiction of the "*res*" or subject-matter will not retain such jurisdiction until the final disposition of the case. While this rule is subject to limitations, it is well settled that while the property is in the possession of a court, either actually or constructively, that court is bound to protect its possession from the process of other courts. (Buck *v.* Colbath, 3 Wall., 334; Andrews *v.* Smith, 19 Blatch., 100, 5 Fed., 833.)'

"The Supreme Court of the United States, in Riggs *v.* Johnson Co., 6 Wall., 196, says:

"'Based on that consideration, the settled rule is that the remedy of a party whose property is wrongfully attached under process issued from a circuit court, if he wishes to pursue it in a State tribunal, is trespass, and not replevin, as the sheriff cannot take property out of the possession and custody of the marshall. Freeman *v.* Howe, 24 How., 455. * * * Undoubtedly circuit courts and State courts, in certain controversies between citizens of different States, are courts of concurrent and coördinate jurisdiction; and the general rule is that, as between courts of concurrent jurisdiction, THE COURT THAT FIRST OBTAINS POSSESSION OF THE CONTROVERSY, OR OF THE PROPERTY IN DISPUTE, MUST BE ALLOWED TO DISPOSE OF IT WITHOUT INTERFERENCE OR INTERRUPTION FROM THE COÖRDINATE COURT. Such questions usually arise in respect to property attached on mesne process, or property seized upon execution; and the general rule is that, where there are two or more tribunals competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first attached or seized. Corresponding decisions have

been made in this court, as in the case of Hagan *v.* Lucas, 10 Pet., 400, where it was held that the marshal could not seize property previously attached by the sheriff and held by him or his agent under valid process from a State court. (Taylor *v.* Carryl, 20 How., 595; Mallett *v.* Dexter, 1 Curt., 174; Fed. Cas. No. 8988.)'

"In Christmas *v.* Russell, 14 Wall., 69, the court says:

"'That judgment (Freeman *v.* Howe, 24 How., 450) was reversed by this court upon the ground that the Circuit Court, having first acquired possession of the *res*, could not be deprived of that possession until the litigation there was brought to a close.'

"See also New Orleans *v.* Steamship Co., 20 Wall., 393."

"Authorities on this precise point might be multiplied indefinitely, but the general rule is so well established as not to require further citation."

Haines *v.* Carter was approved in U. S. *v.* Parkhurst Davis Co., 176 U. S., 317, the court saying as to the injunction:

"This is one of the things which the Federal courts are expressly prohibited from doing."

Justice Shiras gave the court's unanimous opinion in Harkrader *v.* Wadley, 172 U. S., 144-165 (1898).

Therein he clearly showed the true construction of section 720, R. S., to be as herein contended, and where the jurisdiction of the Federal court attached, the ancillary use of the injunction did not violate the statute rule but was a collateral rule necessary to justice.

The law, as this court lays it down, is unexceptional that:

"Where a State court and a court of the United States may each take jurisdiction of a matter, the

tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted."

Section 646 of the Revised Statutes.

Section 646 of the Revised Statutes, its origin dating back to 1789, respecting suits removed for trial from a State to a Circuit Court, has no application here. Obviously it cannot apply, for the decision below was that the Commission was not a court but acting legislatively. Of course neither Judge Pritchard nor this court could have jurisdiction if the Commission was a legislature, for its action was incomplete and still not entirely unexpressed. The Commission might "repeal," if repeal were applicable to the order of publication, and if that order had been complete and necessary to enactment; or it might rescind if a court.

Neither legislatures nor legislators can be made parties to judicial procedure of any kind whatsoever. Why were the Commissioners made parties here? They were constituted a court and the matter was, *in legal contemplation*, settled against the jurisdiction of the United States Court by the fact that the State court had taken prior jurisdiction and had rendered its formal decree.

Section 716 of the Revised Statutes.

Section 716 of the Revised Statutes, originating in 1789, giving to the the Supreme, Circuit and District Courts power to issue all writs "not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law," has no application in these cases.

This provision in its original form appears for the first time in the act of 1789, "to establish the Judicial Courts of the United States," and has never been construed to override or impair the act of 1793. The latter act succeeded it, and prohibits the injunction to stay proceeding in any court of a State, and now contained in section 720 of the Revised Statutes. (See Act of 1789 in 1 Vol. Statutes at Large, p. 81, sec. 14, and the Act of 1793, in same volume, p. 335, sec. 5.)

Against the contention that section 720 should be read in connection with section 716 of the Revised Statutes, Justice Shiras, in the opinion of this court in the case of Harkrader *v.* Wadley, 172 U. S., 165 (1898), shows the inapplicability of the proposition, and referred to French *v.* Hay, 22 Wall., 231-253, and Deitzsch *v.* Huidekoper, 103 U. S., 194.

In the first case of French *v.* Hay, he regarded it as inapplicable to prevent injunction for the reason that "the prior jurisdiction of the Federal court below took the case out of the operation of the provision of section 720 Revised Statutes."

The Deitzsch case was one of like kind and similarly decided.

Opinion of Text Writers.

Spear on the Law of the Federal Judiciary says as to Section 720, Revised Statutes:

> "The statute is one of restraint, and the design of Congress in enacting it was to prevent the Federal courts from interference by writs of injunction of the proceedings in State courts in respect to the courts themselves, and the parties to such proceedings in those courts."

"The same principle equally applies to the power of a State court to stay proceedings in a Federal court."

Spear on the Law of the Judiciary, 321.
McKim *v.* Voorhies, 7 Cranch 279.

Simkins says in his Suit in Equity in the Federal Courts page 337:

"It is a settled rule of comity that the possession of the '*res*' vests the court first acquiring the same with the power to hear and determine all controversies relating thereto, and disables the other courts of concurrent jurisdiction from interfering therewith. Hence it has been held that Section 720 does not apply when the court is seeking to maintain its own jurisdiction over the subject-matter, the possession of which has first been obtained by the court."

Simkins Suit in Equity in the Federal courts, page 337.

Rose in his Code of Federal Procedure, Vol 1, p. 167-70, says in speaking of Section 720, Revised Statutes:

"Under this section Federal courts have refused to enjoin State criminal proceedings, or proceedings to collect back taxes, or probate proceedings, or attachment proceedings upon a Federal bill of interpleader, or to enjoin the prosecution of a suit IN A STATE COURT WHOSE JURISDICTION WAS PRIOR TO THAT OF THE FEDERAL COURT, OR WHICH HAS ALREADY MADE A DECREE."

Rose says, Vol. 1, Sec. 20, page 166:

"Doubtless one of the chief purposes of its enactment (*i. e.*, of Section 720, Revised Statutes), was to forbid the exercise of supervisory or appellate power over State courts proceeding through the agency of

the writ of injunction, and it has been effective to that end."

"It has been effective in preventing injunction directly against a court and generally against its officers. * * *

"It has been effective also in preventing maintenance of Federal suits for the express purpose of enjoining proceedings begun in State courts, and that the injunction was not incident to the relief sought. * * *

"The word 'proceeding' in the section includes all steps taken in the suit from its institution to final process."

Rose, Vol. 1, Code of Federal Procedure, pages 166-7.

Cooley holds in his great work on Constitutional Limitations, page 31, that,

"the same reasons which require that the final decision upon all questions of national jurisdiction should be left to the national courts will also hold the national courts bound to respect the decisions of the State courts upon all questions arising under the State constitutions and laws, where nothing is involved of national authority or of right under the Constitution, laws, or treaties of the United States; and *to accept the State decisions as correct and to follow them whenever the same questions arise in the national courts.* That the power to revise the decisions of the State courts in the cases already pointed (which fully exist here), the due observance of this rule will prevent those collisions of judicial authority which would otherwise be inevitable, and which, besides being unseemly, would be dangerous to the peace, harmony, and stability of the Union."

Cooley's Constitutional Limitations, pp. 31-35, 7th ed.

The State of Virginia stands here in the highest possible attitude. She has countenanced no unseemly proceeding whatever, and has sought her remedy only in the due course of law, which has constant commendation from those who love the peace and order of society.

Adhering to and illustrating the principles which she embodied in her first Constitution, before the American people had declared their independence of Great Britain, she has bided her time until she could here find that vindication which she awaits and confidently expects at the hands of this Supreme tribunal.

Intermixed Powers Again.

My associate, Hon. William A. Anderson, has shown in his argument how the county courts of England possessed legislative, executive, and judicial powers (see pages 18 to 21), and lawyers are familiar with the House of Lords decisions. The Lords are a co-ordinate body of the supreme legislative power and at the same time the highest court of England, not only with respect to the claims of peerage and divorces, but as to the appeals and writs of error in legal cases The decree the appellees ask here would upset the English Constitution if applicable, and tear down the monument of free government in this nation, and in the States as well, "from turret to foundation stone."

To deprive a sovereign people of the right to intermix their sovereign powers at their sovereign will may determine would be, throughout the jurisprudence of the English speaking people, to extract osseous system and leave them as boneless as a delicacy of the feathered tribe put in cold storage for market.

In Calder *v.* Bull, 3 Dallas, p. 386 (1798), this court, in a learned opinion sustained a rehearing from the Probate Court of Harvard of 1793 which had been granted by the legislature of that State.

As the Constitution of the United States does not interdict the intermixture of powers by States, the court had no hesitation apparently in sustaining the legislation relied on.

Iredell, J., said:

> "In England we know that one branch of the Parliament, the House of Lords, not only exercises a judicial power in cases of impeachment, and for the trial of its own members, but, as a court of *dernier ressort*, takes cognizance of many suits at law and in equity; and that in construction of law the jurisdiction there exercised is by the King in full Parliament, which shews that, in its origin, the causes were probably heard before the whole Parliament. When *Connecticut* was settled, the right of empowering her legislature to superintend the courts of justice was, I presume, early assumed; and its expediency, as applied to local circumstances and municipal policy of the State, is sanctioned by a long and uniform practice."

As to the power to be exercised he said:

> "The power is judicial in its nature, and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative powers."

For over two hundred years the State of Virginia has intermixed the powers of her judicial courts, and in view of the facts of that history in illustration of her right, may we not fully inquire, as this court did in the San Land Company case, 174 U. S., 749:

"SHOULD SUCH AN ORGANIZATION BE ADOPTED BY A STATE, WHATEVER MIGHT BE THOUGHT OF ITS WISDOM, WHERE BEYOND THE BODY POLITIC OF THE STATE WOULD ANY POWER LOOK FOR ITS LEGITIMACY?

Conclusion.

We are warned by distinguished public men that if the States do not attend to those concerns which belong properly to their governments, a constructive way will be found for the United States to reach them and take them in hand.

God forbid that the courts of the nation should thus be a party to absorption of those matters that do properly belong to the State and to the breaking up of the States in their worthy and well-aimed efforts to care for them without the intrusion by invented construction from the Federal power.

We have all along had a hard time to prevent glutting Washington city and the courts with the eager searchers for Federal intervention. It is no good man who seeks to multiply their temptations, and no earnest and honest judge will do it.

There are legitimate public questions, and a plenty of them, that belong to the Federal administration, legislative, executive, and judicial. We shall be fortunate if we can justly and appropriately administer them.

The Nation and the States.

That vindication is as important to the other States and to the nation as it is to Virginia. Their relations should be ever cultivated in mutual respect, comity and friendship.

The name of our country, "United States of America," may be referred to in either the singular or plural number.

They are plural as to States, they are one as a federative nation.

Our national legend is "E Pluribus Unum." One what? One nation. One indestructible union of indestructible States. National because the Constitution acts on individuals as well as on States. The legend is a precise definition. Many what? Many States in their identities, ALL together like the Roman faces, bound by one bond.

The nation is a necklace. The States are the beads thereof. The Constitution is the cord that runs through the beads, compacts them together and makes one beautiful necklace of unity.

Our national flag denotes the individuality of the States and the same time the collective union. Each State is a star upon its folds. The whole are a constellation.

Alexander Hamilton compared the Union to a grove in which each State is a tree. The grove would not be upright if each tree were not upright. It draws its sustenance from its own deep roots upon its own ground. It breathes through its leaves that wave in the free air above it.

To spoil one bead, to extinguish one star, to cut down or mutilate one tree, is a mutilation of the whole body of which it is a part, even as the cutting off of a hand, or even a finger, is an impairment of the whole body, a disfiguration and maiming thereof.

To the outer world, we are a nation only. Foreign nations cannot treat with a State, they can only treat with the nation, but in our domestic affairs we are a State of States, a nation of nations, a people of peoples.

From the cradle to the grave the State follows and regulates and adjudicates its own affairs. From the cradle to

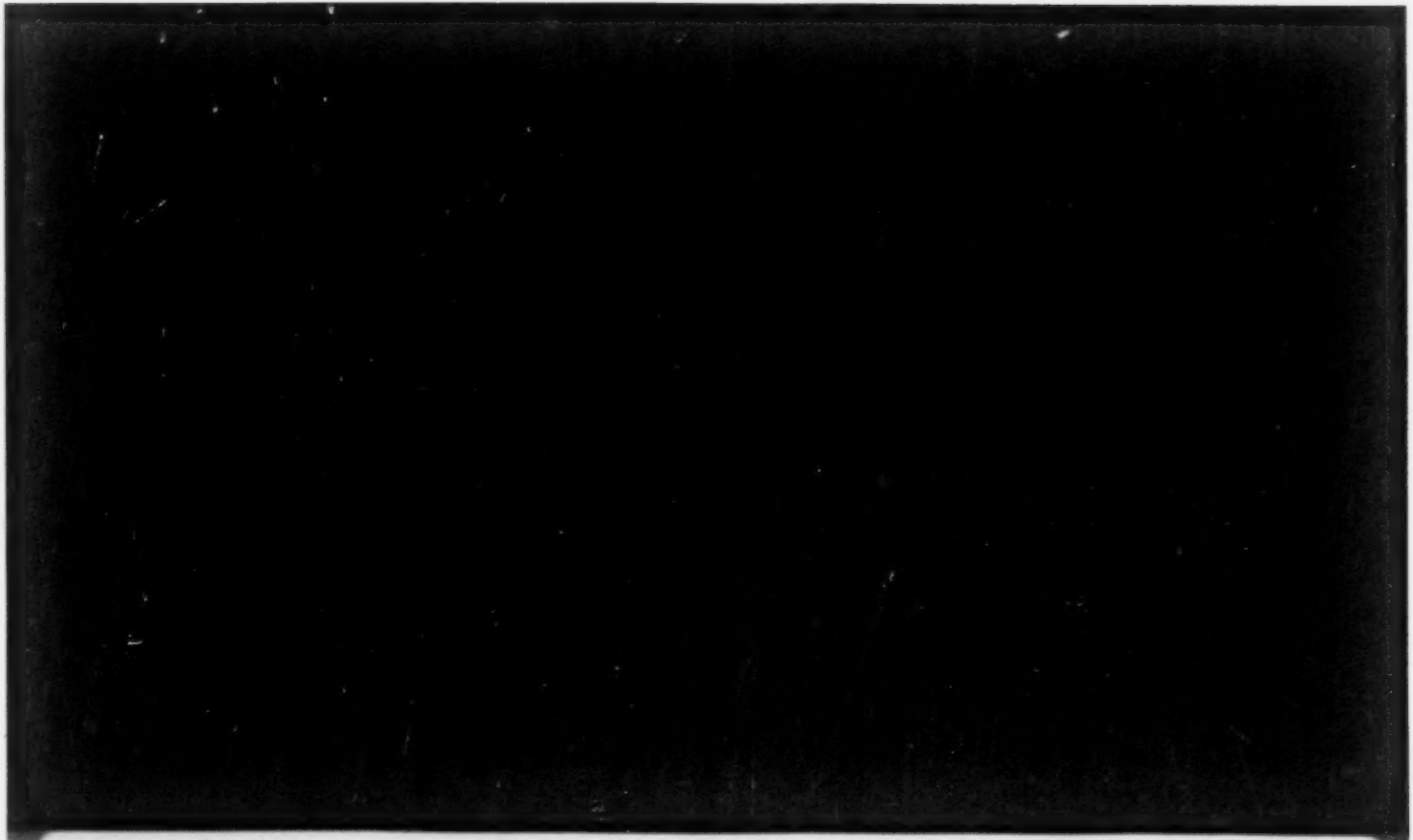
the grave marriage and divorce, birth and death, suffrage and office, the professions and occupations of men, women and children, the ownership of real and personal estate, and the regulation of common carriers, and indeed of all business affairs, belong within the State and to the State only.

We can create nothing, we can only move something, and the movements of people within the State by water or land, the collection of tolls and rates and the fairness thereof, are all affairs which have always belonged to States and should so belong.

When *due process* of law is observed carefully and prudently by men equipped with all the accessories and muniments of justice, the State is a bright bead in a brilliant necklace, a shining star in a brilliant constellation, and a straight and beautiful tree in a most magnificent grove.

The nation has the same interest in each State that each State and its individual citizens has in the nation. In times of great restlessness, of rapidly increasing numbers, and inevitable sensations, it is the office of the judge, than which nothing can be higher, to keep clear the lines of demarcation, to let no twilight settle over the landscape, and that every State and the nation altogether are alike kept in their true orbits of action.

"Due process of law, and "the equal protection of the laws" having been manifestly administered by Virginia, no hand can legally or righteously be laid upon her or upon the court constituted by her sovereign power; nor upon the officers thereof; nor in any way interfere in the proceedings. No court can interfere with her.



SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

Robert R. Prentis and Others, State Corporation Commissioners, and Judges, *Appellants*, vs. Atlantic Coast Line Railroad Company, *Appellee*.	No. 270.
Same, *Appellants*, vs. The Chesapeake & Ohio Railroad Company, *Appellee*.	No. 271.
Same, *Appellants*, vs. Chesapeake Western Railroad Company, *Appellee*.	No. 272.
Same, *Appellants*, vs. Louisville & Nashville Railroad Company, *Appellee*.	No. 273.
Same, *Appellants*, vs. Norfolk & Western Railroad Company, *Appellees*.	No. 274.
Same, *Appellants*, vs. Southern Railroad Company, *Appellees*.	No. 275.

SUPPLEMENTAL BRIEF OF JOHN W. DANIEL IN THE VIRGINIA PASSENGER RATE CASES.

Identity of the Supreme Court of the United States and the State Corporation Commission (Court) of Virginia in the exercise of executive, legislative and judicial powers.

The wit of man can discover nothing lacking to make this high tribunal a Judicial Court. Neither can it dis-

cover anything lacking to make the State Corporation Commission of Virginia a JUDICIAL COURT.

In the parallel of the powers of the two courts which I have made in my printed brief (pages 7 to 19) I omitted the identity in them of the similar exercise of executive, legislative, and judicial powers. But while this court is now hearing an arraignment of the Virginia State Corporation Commission (Court) as void in a judicial sense, because of its constitutional possession of executive, legislative, and judicial powers, it seems to be forgotten that this court is itself equally open to the same objection. This Supreme Court of the United States is now engaged in the exercise of the impugned combination of powers. This court, too, is now exercising them *at one and the same time in the very same case* in which such a thing is held up as especially reprehensible and as CONSTITUTING DESPOTISM.

No disrespect to this court was designed by the attorneys for the appellees in their use of such language. They were only opposing the State Corporation Commission (COURT) of Virginia, used as a butt for their shafts, and seeking to avoid and get around the Supreme Court of Appeals of Virginia, whose unanimous opinion confirming the character of the State Commission (COURT) I have spread out in my printed brief (pp. 22-31).

IDENTITIES IN EXECUTIVE OR POWERS LEGISLATIVE AND JUDICIAL POWERS.

(L.) The JUDICIAL POWERS of both this court and of the Virginia court which is on trial now before you are sufficiently shown in the printed briefs, my own included (pp. 7 to 19).

The judicial powers of the Virginia court are also *adjudicated* in Virginia, as shown by Judge Harrison, giving the unanimous opinion of the State "Supreme Court of Appeals." So let "judicial power" pass.

(II.) *The executive powers of this court and the Virginia court.*

> "The Supreme Court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions" (Section 677, Revised Statutes of the United States).

In this precise language the law confers this specific executive powers on this court. But this is no novelty, for "judicial officers from time immemorial, *and at all times*, have been intrusted with the discharge of executive or administrative functions" (Goodnow's Administrative Powers, vol. I, p. 30; Printed Brief, pp. 53, 54).

The Virginia State Corporation Commission (court) has a similar EXECUTIVE POWER conferred upon it by the CONSTITUTION of Virginia, which says in Article XII, Section 155:

> "THE COMMISSION SHALL ANNUALLY ELECT ONE OF THEIR MEMBERS CHAIRMAN OF THE SAME, AND SHALL HAVE ONE CLERK, ONE BAILIFF, AND SUCH OTHER CLERKS, OFFICERS, ASSISTANTS AND SUBORDINATES AS MAY BE PROVIDED BY LAW, ALL OF WHOM SHALL BE APPOINTED, AND SUBJECT TO REMOVAL, BY THE COMMISSION."

So the Legislature of Virginia had the constructive model of Congress before it as the ideal, and the model of this court in its action for their action. The action of Virginia Commission court is true to the ideal and the precedent.

Both the United States and Virginia move on the same plan.

The Officers of this Court and of the Virginia Commission Court.

This court would not permit its marshal or its clerk to be interfered with, or enjoined, or interrupted in the exercise of the duties which it conferred upon him.

They are to this court the right and left hand of justice. They are essential—indeed indispensable—part of the administration of justice. This court threw its shield over a marshal defending one of its judges. In the discharge of his official duty it would certainly hold him "not guilty" in defending himself as the incarnation of those duties.

Would this court, which will not even permit a Cabinet Secretary *or his officials* to be interfered with or enjoined in their discharge of their administration, permit its own clerk to be so interfered with or enjoined? To ask the question is to answer it.

How, then, in the name of that justice which the Constitution of the United States proclaims its object to "establish" can this court tolerate the notion that a court of Virginia can have the clerk of one of its judicial courts enjoined by order of a United States court which is bound by the law of section 720 of the Revised Statutes of the United States, prohibiting "ANY COURT" of the United States "to stay *proceedings* in any court of a State." This necessarily includes "all steps taken by the court OR ITS OFFICERS under its process from the institution of the suit until the close of the final process of execution."

U. S. *v.* Collins, 4 Blatchford, 156.

There is a comity of States, as there is a comity of individuals. It must exist, else good bye to peace and order, and civility. Our fathers knew this. They fixed it in judicial proceedings; and Washington, as President, crowned the work.

"The youth who fired the Ephesian dome" is the only kind of person to pull that work down.

There are some of that youth's kindred in this country. They alone would welcome the desecration.

IDENTITY OF THE SUPREME COURT OF THE UNITED STATES AND OF THE STATE CORPORATION COMMISSION ON EXERCISE OF THE LEGISLATIVE POWER.

That this court exercises legislative power is not to be questioned.

It has been adjudicated by this court by judges whose names are not surpassed by any in public sanction, or in their acceptance by other jurists on and off the bench.

The Congress of the United States, which might itself have covered the subject by enactment, delegated to this court a vast and comprehensive power. Witness the Code of Rules in Equity that cover all the States, and the land and sea, and that are now in force as "the law of the land," and are being administered in this cause.

The Revised Statutes of the United States provide that—

> "The forms of mesne process and the forms and modes of proceedings in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute, or by rules of court, made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, AND TO REGULATION BY THE SUPREME COURT, BY RULES PRESCRIBED, FROM TIME TO TIME, TO ANY CIRCUIT OR DISTRICT COURT, NOT INCONSISTENT WITH THE LAWS OF THE UNITED STATES."

Witness also its regulation of the "whole practice" of the inferior courts in equity and admiralty as expressed below.

The equity rules of the Supreme Court prescribed to any circuit or district court, have the force and effect of law, unless in ~~conflict~~ Revised with Federal Statutes.

Federal Statutes, annotated, vol. IV, 592, and cases cited.

Section 917 of the Revised Statutes provides that—

> "The Supreme Court shall have power to prescribe from time to time and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and GENERALLY TO REGULATE THE WHOLE PRACTICE TO BE USED IN SUITS IN EQUITY AND ADMIRALTY BY THE CIRCUIT AND DISTRICT COURTS."
>
> "The equity and district courts and other courts of the United States are not subordinates of this court as the colonels of regiments are to their brigadiers, or the captains of companies are to their colonels. Nevertheless, this court can regulate THEIR rules, *'any rules prescribed,'* and their whole practice," and have long ago done it.

This was in the exercise of LEGISLATIVE POWER delegated to the court by Congress, which declined to exercise the power itself, and conferred it upon the present body.

Mark now the words of Chief Justice Marshall, Justices Washington, Johnson, Duval, Story, and Thompson uniting with him, Justice Todd being absent, in 10 Wheat., 42 (1825). Chief Justice Marshall, giving their united opinions, said:

> "It will not be contended that Congress can delegate to the courts or to any other tribunals powers which are STRICTLY AND EXCLUSIVELY LEGISLATIVE. BUT CONGRESS MAY CERTAINLY DELEGATE TO OTHERS POWERS WHICH THE LEGISLATURE MAY RIGHTFULLY EXERCISE ITSELF."
>
> "Without going further for examples, we will take that, the legality of which the counsel for the defendants admit, the 17th section of the judiciary and of the 7th section of the additional act, empower the courts respectively to regulate their practice. *It will*

> *certainly not be contended that this might not be done by Congress.* The courts, for example, may make rules demanding the return of writs and processes, the filing of declarations and other pleadings, and other things of the same description. *It will not be contended that these things might not be done by the legislature without the* INTERVENTION OF THE COURTS, YET IT IS NOT ALLEGED THAT THE POWER MAY NOT BE CONFERRED ON THE JUDICIAL DEPARTMENT. The line has not been exactly drawn which separates those important subjects which must be entirely regarded by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the detail."

IDENTITY OF THE SUPREME COURT OF THE UNITED STATES AND THE STATE CORPORATION COMMISSION (COURT) OF VIRGINIA, &C., EXERCISING AT ONE AND THE SAME TIME THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL POWERS IN THE SAME CASE.

We are told by the appellees here, and it appears on the Norfolk & Western Companies' bill, that the State Corporation Commission (Court) was made by the Virginia Constitution

> "*incapable* of the judicial consideration and judicial action in respect to the *large* interests above mentioned of transfer rates and transmission companies which due process of law requires; and in knowledge that it has powers as a judicial tribunal to pass upon the validity of its acts in the capacities referred to." (Norfolk & Western Record, 274, top p. 5.)

It also alleges that the Commission Court denies to the complainants below

> "the protection of judicial tribunals which are NOT clothed with legislative, administrative, and executive functions in respect to matters in which they are

> called upon to exercise their judicial functions such as are provided for by every other interest in the State (Virginia) by the constitution and laws of Virginia," etcetera. (N. & W. Bill, p. 5.)

This is the curious screed preached against the Virginia court, while conjuring this court, which is similarly "INCAPABLE," if it be true. Here and now in this very case this Honorable Court

(1) Could send its marshal, *appointed by it under executive power, to*

(*a*) Arrest the gentlemen who constitute the State Corporation Commission (Court) of Virginia.

(*b*) or the bailiff of the Commission.

(*c*) or the clerk of the Commission.

(*d*) or any lawyer in the case.

if any of them committed an act of contempt with reference to the proceedings bearing on this case here.

The State Commission, not "independent," quoth the Norfolk and Western complainant, but this court "independent," and not complicated by commixture of powers.

(2) So could this court exercise any of its administrative powers that may be applicable to this case; and all courts have some administrative powers.

(3) As to its legislative powers, it is exercising them as to all the proceedings in this case which involve the powers or the rules which it may be called on at any moment to interpret and apply.

This court will pass upon the demurrer which it made the law of the land, as to its fitness and its form and its application here, under a legislative power conferred upon it by Congress, and adjudicated by itself.

And, after all, Judge Pritchard's decision that the State Commission (Court) of Virginia fatalized our case by exercising "a legislative function" in nowise meant that he was ruling on a legislature. The Legislature of Virginia did not confer that so-called "legislative function" on the Commission.

Legislatures never make schedules of rates. Directors of companies exercise "legislative functions" as delegated powers. And the Commission, aided by the delegated powers, which it got direct from the Constitution and the people of Virginia, exercises them, as this court does, as judicial powers. (1) This court is now in the exercise of executive powers, through its self-approval of them; (2) legislative power to make comprehensive regulations of its own making, and (3) judicial powers derived direct from the Constitution of the United States. The commixture of powers in this court could not be more complete.

II.

All Administrative Duties that Require the Existence of Facts and the Application of Law Thereto, may be made Judicial Questions by Congress in Federal Matters, and by the Law-making Power of a State in a State Matter.

If the nature of an administrative question involve the exercise of the judicial faculties for its solution, it may be made a judicial question, and referred by law to the jurisdiction of the courts.

This was expressly held in the great case of Hoboken Land Co. *v.* Murray, 18 Howard, 272 (1855), wherein Judge Benjamin R. Curtis gave the opinion of a unanimous court, and illumined the subject with a perspicuous pen. He said:

> "That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, *a judicial act, must be admitted.*
>
> "*So are* [judicial acts] *all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law.*
>
> "In this sense the act of the President in calling out the militia under the act of 1795, 12 Wheat., 19, or of a commissioner who makes a certificate for the

extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact (United States *v.* Ferreira, 13 How., 40). It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution.

"We do not doubt the *power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted.* The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the Treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and *without regard to the consent of Congress*, a judicial controversy, and we are of opinion it is not" (18 How., pp. 280-281).

Discussing the acts of Congress which had granted the power to the courts to make rules and regulations, now no longer debatable, and referring to the act of Congress, 1789, Chief Justice Marshall said (10 Wheaton, 41-42):

"The system, as it then stood, is adopted, *subject, however, to such alteration and addition as the said courts respectively shall, in their discretion, deem expedient*, or to—

"*such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same* * * *

"The counsel for the defendants contend that this clause, if extended beyond the mere regulation of practice in the court, would be a delegation of legislative authority which Congress can never be supposed to intend, and has not the power to make.

"But Congress has expressly enabled the courts to regulate their practice by other laws. The 17th section of the Judiciary Act of 1789, c. 20, enacts, 'That all the said courts shall have power'

> "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States; and the 7th section of the act, 'in addition to the act entitled an act to establish the judicial courts of the United States' (Act of 1793, ch. 22, s. 7) details more at large the powers conferred by the 17th section of the Judiciary Act. These sections give the court full power over all matters of practice; and it is not reasonable to suppose that the process act was intended solely for the same object. The language is different, and the two sections last mentioned have no reference to State laws."

The court was construing and applying a law made by itself.

In U. S. *v.* Halleck, 1 Wall., 439 (1863), the Board of Commissioners to settle private land claims in California rendered a decision which was approved by the United States District Court on appeal, and affirmed by this court, Judge Field giving the opinion.

> "By the act of June 14, 1860, the district courts of California were given authority to order into court any survey, and to decide on it upon the application of any party which it deemed to have interest in the survey and location to make it just and proper that he should be allowed to take testimony and intervene for his interest therein."

Thus ADMINISTRATIVE matter was made JUDICIAL at the instance of any party in interest.

In Riverside Oil Company *v.* Hitchcock, 190 U. S., 316 (1902), it was held that Congress had constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal, with judicial functions, to which is confided the execution of the laws which regulate the purchasing, selling, and care and disposition of the public lands.

And farther, Judge Peckham, giving the opinion, said:

> "Neither an injunction nor a mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion."

The learned Judge cites numerous cases, and fixes the principle that those exercising judicial functions under the Government of the United States are *not subject to either injunction or mandamus with reference to their discharge of duty.* Thus was, by act of Congress, an ADMINISTRATIVE OFFICER of the executive department clothed with JUDICIAL POWERS with respect to an ADMINISTRATIVE CASE which had been MADE A JUDICIAL ONE.

How much the more is this court constrained to respect the constitution of a State and the court of a State embodied therein in the exercise of its expressly granted judicial authority!

III.

Appeals.

One of the Judges asked counsel "whether or not ALL THE FACTS in the case before the State Corporation Commission of Virginia could be put before the Supreme Court of Appeals of that State in the appeal granted as a matter of right to the appellees in this case, if such there were."

The constitution and the legislative act of April 15, 1903, give the affirmative answer. The provisions of that constitution respecting this matter are contained in section 155 and section 156, under the sub-heads *d*, *e*, *f*, and *g*.

Appeal Lies as a Matter of Right.

An appeal lies as a matter of right,

> (*d*) From any action of the Commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation com-

pany, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in subsection.

Corporations involved are granted an appeal to the Supreme Court of Appeals of Virginia in like manner as from inferior courts and as a matter of right.

If the appeal is against the complainant, the Commonwealth is made appellee, but in other cases the corporations defendants.

The Attorney General of Virginia, or his representative, represents the Commonwealth in all appeals.

No court but the Supreme Court of Appeals of Virginia can there review or reverse, annul or delay action of the Commission.

"No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties: provided, however, that the writs of *mandamus* and prohibition shall lie from the Supreme Court of Appeals to the Commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer."

"(*f*) In no case of appeal from the Commission shall *any new or additional evidence be introduced in the appellate court;* but the *chairman of the Commission, under the seal of the Commission, shall certify* to the appellate court (1) *all the facts upon which the action* appealed from was based and which may be essential for the proper decision of the appeals, (2) *together with such of the evidence introduced before, or considered by, the Commission as may be selected, specified and required to be certified, by any party in interest,* (3) as well as such other evidence, so intro-

duced or considered, as the Commission may deem proper to certify. The Commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a *written statement of the reasons upon* which the action appealed from was based, and such statement shall be read and considered by the appellate court, upon disposing of the appeal."

The Text of the Constitution Continues Giving Supreme Court of Appeals Power to Define Just Rates.

"The appellate court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from as well as any other matter arising under such appeal: provided, however, that the action of the Commission appealed from shall be regarded as *prima facie* just, reasonable and correct; but the court may, when it deems necessary, in the interest of justice, remand to the Commission any case pending on appeal, and require the same to be further investigated by the Commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest), before the appeal is finally decided."

Thus on appeals to the Virginia Supreme Court the chairman of the Commission is required to certify (1) ALL the essential facts upon which the action of the Commission was based,

(2) Together with such of the evidence as may be selected, specified, and required by any party in interest,

(3) As well as such other evidence introduced as the Commission may deem proper, and

(4) A written statement of the reasons upon which the action appealed from was based.

(5) Such reasons are to be read and considered by the Virginia appellate court.

Supersedeas.

Writs of supersedeas are allowed suspending operations from the action appealed from until the final disposition of the appeal.

No action of the Commission respecting the subject of appeals is suspended until a suspending bond has been executed and filed sufficient in amount and security to insure the prompt refunding by the appealing corporation of all charges which said company may collect or receive pending the appeal in excess of those fixed or authorized by the final decision of the appellate court. Upon final decision of such appeal all amounts which the appealing company may have collected pending the appeal in excess of those authorized, shall be promptly refunded by the company to the parties entitled thereto. All such appeals have precedent on the docket of the appellate court.

Here then is complete and orderly remedy. It is easier and prompter than the one the appellees adopted, and only through following it could the ends of justice be swiftly reached. It was a fair way out of the question in dispute, and the perfection of a rounded theme of jurisprudence.

IV.

WHEN RATE IS TOO HIGH OR TOO LOW FIX THE PROPER CHARGE.

When one says a charge is too high or too low, it would be well to say what is a proper charge. Two bites at a cherry are one too many.

An act of Massachusetts gave to actual water-takers within ten miles of the State House of the city of Boston, aggrieved by the rate charged or about to be charged, the right to apply to the Supreme Judicial Court to determine the reasonable-

ness of the rate and what rates are reasonable, so far as the interests before the court are concerned, is constitutional.

In Janvrin's petition, 174 Mass. 1 (1899), Chief Justice Holmes, giving the unanimous opinion of the Supreme Judicial Court of Massachusetts, held the act constitutional, and overruled the demurrer of the petitioner.

The Chief Justice, in his opinion, stated: "The act calls on us to fix the extent of actually existing rights," and, in addition:

> "With regard to such rights judicial determinations are not confined to the past. If it legitimately might be left to this court to decide whether a bill for water furnished was reasonable, and, if not, to cut it down to a reasonable sum, it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future."
>
> "But it has been regarded as competent for a court to pass on the reasonableness of a rate even when established by the legislature, to the extent of declaring it unreasonably low." (Chicago, M. & St. P. Ry. *v.* Minnesota, 134 U. S., 418; Chicago and G. T. Ry. *v.* Wellman, 143 U. S., 339, 344; Reagan *v.* Farmers' L. & T. Co., 154 U. S., 362; Smyth *v.* Ames, 169 U. S., 466.) *A fortiori*, when the rate is established by the company, and it has undertaken to charge the plaintiff a sum which he alleges to be unreasonable, and the legislature in terms has referred him to this court, this court has 'jurisdiction to inquire into the matter and to award to the [plaintiff] any amount exacted from him in excess of a reasonable rate.' (Reagan *v.* Farmers' L. & T. Co., 154 U. S., 362, 397.)
>
> "It is true that in Reagan *v.* Farmers' L. & T. Co., it was said also that 'it is not a function of the courts to establish a schedule of rates' (154 U. S., 400); and to that proposition we fully agree. But it will be observed that the proposition is laid down with the statement that 'the challenge in this case is of the tariff as a whole, and not upon any particular rate upon any single class of goods.' Probably to prepare a new schedule, or to rearrange the old one, would

> have gone beyond the scope of the rights immediately affected or threatened in the case before the court, into the realm of abstract law-making for the future, and so beyond the power of the court; and, if it had not been beyond the court's power, still very possibly it might have been refused in the court's discretion, the court leaving it to the proper body to undertake that task. But it is implied that if the challenge had been of a single rate threatened to be charged for a service demanded, the court might have determined the question between the parties for the immediate future, as it is stated three pages earlier that the court would determine it with regard to a charge for past services. WHEN YOU ARE PREPARED TO SAY THAT A GIVEN CHARGE IS TOO HIGH OR TOO LOW, IT HARDLY WOULD BE CONSISTENT TO SAY THAT YOU HAD NOT THE POWER OR ABILITY TO SAY WHAT IS A PROPER CHARGE."

This case shows that where a court has the power to refer a question of rate-making to a court under the law of a State, it is competent for that court to hear and adjudicate it.

It also shows that the Massachusetts court did not regard it incompetent for the legislature to impose, or for it to establish a rate.

Comparison of this Case with Massachusetts Case.

The Virginia case differs from the Massachusetts case in this: That the duties which the Constitution of Virginia imposes upon the Corporation Commission Court, and also upon the Supreme Court of Appeals of Virginia, was embodied as a part of the judicial system under which both courts assume and enter upon the discharge of their judicial duties.

This investure of jurisdiction and duty which both courts assume to discharge with an oath, render it imperative upon both without the exercise of any discretion of their own as to whether they would or not discharge the part assigned them by the fundamental law. The assumption of judicial

functions in making rates for the future in a particular case under reference from the Legislature of Massachusetts presents a case which goes to the very door of this one. The fact that the Constitution of the State of Virginia made it the duty of both the State Corporation Commission Court and the Supreme Court of Appeals to adjudicate these causes, and, if need be, for the Supreme Court of Appeals to fix future rates rightfully, if the court below had erred, in that respect. These worthy things were accomplished.

First. The creation of a stable, continuing body practically open always took the place of a political body—the Legislature.

Second. The Legislature never did fix schedule of rates. It always delegated that power to some body. It is the interest of all alike to have the Constitution delegate it to a highly competent judicial body.

"No Man Can be Judge in His Own Case" Considered.

It is undeniably true and axiomatic that no man can be judge in his own case, or in a case in which he has a personal interest.

> "But this, like all other very general propositions, in order to make it the base of a practical rule, must have a reasonable construction and must be taken not as absolute and invincible, but with all necessary and implied qualifications" (Chief Justice Shaw in Inhabitants of North Hampton Smith, 11 Metcalf, 394—1861).

The Supreme Judicial Court of Massachusetts held in the above quoted case that a bequest to a town did not disqualify a citizen of the town from acting as Judge of the Probate of the will that made such bequest. That the interest to disqualify a judge is "not the bias or prejudice which would be sufficient to set aside a juror," and must depend

upon facts capable of being precisely averred and proved, and thus put in issue and trial (p. 395).

> "The interest to disqualify a judge must be a pecuniary or a proprietary interest, in a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy, or bias, which would disqualify a juror" (Smith *v.* Bradstreet, 16 Pick., 264).

It must be a pecuniary or a proprietary interest, in a relation by which as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy, or bias, which would disqualify a juror (Smith *v.* Bradstreet, 16 Pick., 264).

That a court may pass on the law of its own creation with legislative authority has been already shown with political practice of this court. (See *ante.*)

Over the Rubicon.

The Chief Justice of Massachusetts and the Supreme Judicial Court of that State have unanimously crossed the Rubicon of debate on this subject. The reference of a legislature to that court of a judicial question which involved rates for the future led to the right solution thereof, but a legislative right to refer such a matter to a court and a constitutional jurisdictional mandate to a court in the specification of its duties as a court, is essentially a far higher and overreaching thing. It puts the duties involved in the very heartbeat and fiber of the constitutional system to be administered. It elevates the matter into the highest rank of judicial function.

It is especially to be observed that in these cases at bar it is not a question of a *schedule of rates*, nor is it a challenge

to a tariff schedule as a whole, nor indeed is it a challenge to any particular rate upon a single class of goods. It is the maximum rate to be charged passengers which involves a very simple proposition.

No Abstract Question Here.

Neither does this case carry us in the vague realm of abstract law making of the future. It is not fastened in the application of the law to a period of five years, which was the case in Massachusetts. No provision was made in the reference there for the alteration or modification of the rates for water; at least there is no suggestion of it in the report.

The Commission is nearly always open, and any changed condition may be brought to its attention whenever desirable to the ends of justice and at the behest of any party. It cannot have less than one regular public session in every three months in each year, and it may provide for extra or special public sessions, if in their judgment such extra or special public sessions may be necessary or required. Access to the Commission to change rates is therefore easy and may be continuously repeated. If the rates fixed in the orders or decrees involved in these cases, immediately or at any time before now, be found to be objectionable, the corporations, which are here the appellees, would have readily found a hearing on application to modify, alter, or rectify.

Precedent from Old Virginia System of Law.

It will be seen that the county and corporation courts of Virginia were for a long period, and until after the civil war had brought about a new constitution which went into force in 1869, examiners respecting the case of parties accused of offense. If the accused were a white person charged with a felony or a free negro charged with felonious homicide, or any offense punishable with death, and it appeared that a felony had been committed, they then inquired if

there was probable cause to charge the accused therewith and the examining court then remanded him for trial to the circuit court having cognizance of the case.

If the examining court were of opinion that the accused was guilty of a misdemeanor of which he ought to be tried in the county or superior court, he was let to bail or committed to jail to answer an indictment in such court. Eight justices, if as many there were of the county or corporation court in which the accused was committed, made the examination (Code of Virginia, 1860, p. 827, Argument, p. 52).

It thus appears that whether the accused were to be tried by the court of which they were members for a misdemeanor, or for a felony in the circuit court, the examining court passed primarily upon the question whether or not there was probable cause to charge him with the offense. It was not considered that the performance of this duty in anywise committed the court to the fact that the accused was guilty or rendered it in any degree partial in his trial when he should come before them as justices of the county of corporation court to try him before a jury.

In the case now before this court, the proposition of a two-cent rate was in nowise a committal to that rate, nor did it do more than lead to the citation and notification of the corporations interested to show cause and assign their reasons why it should not be ordered.

The same argument that is used here in this case is now being used in advocacy of a statute to prohibit justices from trying cases of contempt committed not in their presence. When a judge in whose presence an act of contempt is committed, summons the party by a bench warrant to appear before him, he does not conclusively commit himself to the judicial opinion that the party summoned was guilty of contempt or in anywise pass judgment upon him. He may, as soon as the party appears to purge himself, facts not seen or heard by him that convince him of innocence.

No Case of a Body Having the Whole of Any Power. The Commission Not a Legislative Body.

The Corporation Commission does not have the whole judicial power of the State with respect to rate fixing. It shares that power with the Supreme Court of Appeals, which may either annul the rate ordered by it or alter it up or down. It has just the same administrative duties about fixing rates that any court has with respect to enforcing its own decrees, in directing its own officers, and controlling the incidentals of its jurisdiction. It has no legislative power whatever, either to repeal anything that it has done or to amend what it has done, save by proceeding in a judicial way to hear and to determine. No legislation whatever can emanate from its hands. The ancillary legislation to put into effective operation the provisions of the constitution relating to the creation, appointment, and organization of the State Corporation Commission, its jurisdiction, powers, functions, and duties; the qualifications of the members and officers thereof; appointments and salaries; the location of its offices and places and times of its public sessions; its writs, processes, findings, and judgments; appeals from its orders, findings, and judgments, and its expenses, &c., is contained in the act of April 15, 1903, a copy of which is exhibited in the record of the Chesapeake and Ohio Railway case, page 72.

Its constitutional powers, so far as they have been in different States usually exercised by legislatures, are confined and limited by sections 155 and 156, and that those powers are both judicial and administrative is all that can be said of them in a strict sense.

The same may be said of all commissions, that they must exercise in an abstract sense powers that partake of administrative and executive character. The application of the judicial sanction by creating the Commission in the Virginia case, subserves the great purpose of enabling those cases which affected rates to be promptly adjudicated in a fairer

and fuller way than any ordinary court of justice could administer such a matter. There is nothing so hidebound in the adjectives, legislative, administrative, and judicial, as to restrain the sovereignty which distributes powers from affixing things to them which did not belong to them before, and which had usually been attended to by a different order of arrangement. A director of a corporation administers the government of his State when he fixes rates by exercising the administrative or legislative power delegated to him by the State. In his inquiries as to the fitness of a rate proposed to the directory, he must exercise what are intrinsically judicial functions, and in arranging to have the rate fixed carried out he must also exercise intrinsically executive functions.

In the great majority of cases all over this country the intrinsically legislative, the administrative, the executive and judicial faculties respecting a public matter have been committed to the private citizens who control our public utilities. They may be deeply interested sometimes for a high rate, and may be passing upon subjects in which they share large ownership, but there is no law under which they may be impugned if they deliver their honest judgment.

Interest in the subject does not disqualify the Virginia Corporation Commissioner, for he can have none. His elevated station and the expressed mandate of law remove him from the ordinary temptations which beset and sometimes overcome the private persons who act in directories, and that the private persons who are in the environment of temptation should charge the Commission, through their attorneys, with being in a position of partiality, that disqualifies them from judicial office *is aliunde*.

Respectfully submitted,

JNO W. DANIEL.

Virginia State Corporation Commission Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908

Robert R. Prentis *et. al.*, Appellants, vs. Atlantic Coast Line Railroad Co., Appellee.	No. 270.
Robert R. Prentis *et. al.*, Appellants, vs. The Chesapeake and Ohio Railway Co., Appellee.	No. 271.
Robert R. Prentis *et. al.*, Appellants, vs. Chesapeake Western Railway, Appellee.	No. 272.
Robert R. Prentis *et. al.*, Appellants, vs. Louisville and Nashville Railroad Co., Appellee.	No. 273.
Robert R. Prentis *et. al.*, Appellants, vs. Norfolk and Western Railway Co., Appellee.	No. 274.
Robert R. Prentis *et. al.*, Appellants, vs. Southern Railway Company, Appellee.	No. 275.

SUPPLEMENTAL BRIEF FOR APPELLEES

as to the jurisdiction of the court below under the "commerce clause" of the Constitution of the United States (Article 1, Section 8, paragraph 3.)

The bills of complaint:

Record No. 270, article 8, page 16;
Record No. 271, article 9, pages 27–28;
Record No. 272, article 12, page 11;
Record No. 273; " 5, " 5;
Record No. 274, article 10, page 20;
Record No. 275, article 10, pages 17–18;

avers, in substance, as follows:

"This complainant further shows that its existing rates are properly adjusted in their relation between its interstate rates and its State rates in Virginia and other States, and that all its charges are just and reasonable in themselves, and do not, and will not give to this complainant more than a just and reasonable return upon the value of its property used in the transportation service which it renders to the public; and that any reduction in its revenues will seriously embarrass and obstruct it in providing, and will deprive it of its power to properly provide, the facilities which the public commerce dependent upon it for transportation absolutely requires for the movement of traffic, both intra and interstate. This complainant is advised that no State has a right to require that its own traffic between points within the State, shall be given a preferential service, or shall be carried at preferential and lower rates than other traffic. No State has a right to require such discrimination or partiality in favor of its own traffic. This complainant shows that the effect of the said rates proposed to be put into effect, pursuant to the order of the State Corporation Commission hereinbefore referred to, will be to destroy the proper adjustment of its intrastate rates in Virginia to its interstate rates generally, and to its intrastate rates in other States, and to require that a preference shall be given by this complainant, and an undue discrimination exercised by it, in favor of the intrastate passenger traffic in Virginia over the interstate passenger traffic carried by this complainant, and over the intrastate passenger traffic of this complainant in other States, and that to require such preferential and such undue discrimination in regard to the intrastate passenger traffic of the State of Virginia, would be to so regulate and burden interstate commerce as to violate the commerce Clause of the Constitution of the United States, the benefit and protection of which this complainant respectfully sets up and claims."

The Commerce clause provides (United States Constitution, Article 1, Section 8, par. 3):

> "The Congress shall have power * * * to regulate commerce * * * among the several States."

That the order of the State Corporation Commission of the 27th of April, 1907, the publication of which is enjoined in these proceedings, directly regulates the interstate commerce of these appellees in that, because of and by means of said rates so prescribed by the State Corporation Commission, an interstate passenger is enabled to obtain his interstate transportation at a less and different rate from that prescribed under the provisions of the Interstate Commerce Act in the tariffs of these appellees, duly filed with the Interstate Commerce Commission and published according to law, is shown by the following illustration:

Take the case of an interstate carrier from Richmond, Virginia, to Washington, D. C. It has its interstate rates duly filed and published for passengers between those two points, and the fare is, say, $3.50. The intrastate fare from Richmond, Va., to Alexandria, Va., a point intermediate to Washington, under the rate prescribed by the order of the State Corporation Commission is, say, $2.15. The passenger starts from Richmond with the intention of going to Washington; he pays the fare from Richmond to Alexandria, $2.15, and the fare from Alexandria to Washington 15 cents, the total being $2.30, thus obtaining his interstate transportation at $1.20 less than the published interstate rate of the carrier.

In "Railroad Commission cases," "Stone *v.* Farmers' Loan & Trust Co.," 116 U. S. 307, Chief Justice Wait said (page 325):

> "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some

contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce."

In *ex parte* Young, 209, U. S. 123, Mr. Justice Peckham said (page 145) :

"Still another federal question is urged, growing out of the assertion that the laws are, by their necessary effect, an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous."

In United States *v.* Colorado & N. W. R. R. Co., 157 Fed. Rep. 321, Judge Sanborn said (page 330) :

', The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary, in order to regulate interstate commerce fully and effectually. The people of the United States carved out of their sovereign power, reserved from the States, and granted to the Congress of the United States exclusive and plenary power to regulate commerce among the States and with foreign nations. That power is not subordinate, but it is paramount to all the powers of the States. If its independent and lawful exercise of this congressional power and the attempted exercise by a State of any of its powers impinge or conflict, the former must prevail, and the latter must give way. The Constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land."

In Perkins *v.* Northern Pacific R'y Co., 155 Fed. Rep. 445, Judge Lochren said (page 453) :

"And it would seem to be very difficult to avoid * * * the conclusion that these rates fixed in respect to Minnesota do necessarily and directly affect interstate commerce," * * * (page 454) "And until Congress does exercise that control, and certainly while the Supreme Court continues to hold, as it has, that the State may regulate the local commerce that is entirely within the State, I do not think it would be proper that I should attempt to hold that these acts are void as invasions of the right of Congress to control exclusively the avenues of interstate commerce, although I must confess that the arguments to the effect that these particular acts of the Minnesota Legislature do interfere, necessarily and directly, with interstate commerce, are extremely cogent."

In L. & N. R. Co. *v.* Eubank 184 U. S. 27, the Supreme Court held the Kentucky statute unconstitutional as construed by the State court in its application to a long and short haul where the short haul was wholly within the State and the long haul was partly within and partly without the State. The court said that the direct effect of the statute so construed was to regulate the interstate rate, for it was impossible for the carrier to do any interstate business at the local rate, and so it must give up its interstate business, or else reduce the local rate in proportion. The result therefore was a direct interference with commerce between the States.

Mr. Justice Peckham in delivering the opinion of the court, said (page 41):

"The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision might affect interstate commerce. * * * But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling

> the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United St. tes gives to the Federal Congress."

It is respectfully submitted that the case under consideration is very nearly the exact converse of the Eubank case. There the Supreme Court of Kentucky held, that the Kentucky act, in the long and short haul clause, took the interstate rate from Nashville to Louisville as the standard and could lawfully require the carrier to make his intrastate rate conform, but the Supreme Court of the United States, on appeal, held that this could not lawfully be done, because by that means the State legislature could directly affect and regulate to some extent the interstate commerce of the carrier.

The imposition of a maximum rate of 2 cents between Richmond and Alexandria, to use the foregoing illustration, practically as directly affects the interstate commerce of the carrier between Richmond and Washington as the Kentucky Legislature did in the Eubank case, indeed, practically to a much greater extent.

In Hanley *v.* Kansas City So. Ry. Co., 187 U. S., 617, Mr. Justice Holmes, delivering the opinion of the court, said (page 620) :

> "No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole road; there can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress."

The rate of $3.50 from Richmond to Washington, duly filed with the Interstate Commerce Commission and published according to the Act of Congress, is the only lawful rate. See

Gulf Col. etc. *v.* Hefley, 158 U. S. 98;
T. & P. *v.* Nugg, 202 U. S. 142;
T. & P. *v.* Abilene Cot. Oil Co., 204 U. S. 426;
T. & P. *v.* Cisco Oil Co., 204 U. S. 449;
So. Ry. Co. *v.* Tift, 206 U. S. 428;
Armour Packing Co. *v.* U. S., 209 U. S. 56.

Mr. Justice Peckham, delivering the opinion of the court in the Eubank case, said (page 36)

> "We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident."

It would seem that the effect upon interstate commerce is even more direct and the regulation more important in the case here than in the Eubank case, and if the law be as laid down by the court above quoted, *a fortiori* where the interference is more direct and more important, the same law should prevail. The illustration above shows "precisely what is the degree of interference with transportation of property or persons from one State to another which this statute purposes."

Mr. Justice Peckham continues (page 40):

> "Is it an answer to this statement to say that the company can get this business by lowering its rates within the State to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the

> State? If it be, is not the law which accomplishes this result a direct interference by the State with interstate commerce? And if it do not lower its State rates, and, in consequence, must raise its interstate rates in order to make its State rates valid, and thus lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the State of that commerce which ought to be free therefrom?"

In like manner we reply, is it an answer to this statement to say that the carrier may lower its interstate rate so as to conform to the maximum prescribed by the State authorities for that portion of the interstate journey which lies within the State of Virginia? If it be, is not the law which accomplishes this result a direct interference by the State with interstate commerce? And if it do not lower its interstate rate, and in consequence lose to an appreciable and important extent the revenue to which it is lawfully entitled, is not a law from which such necessary and direct consequences result a regulation in effect by the State of that commerce which ought to be free therefrom?

Is not the State provision vitiated by the fact that it does compel the carrier to regulate, adjust or fix his interstate rates in reference to the rate within the State, and thus enable the State to directly affect and in this way regulate to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress?

Mr. Justice Peckham continues (page 42.)

> "In the case at bar the State claims only to regulate its local rates by the standard of the interstate rates, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if

so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to, an interference, with, and a regulation of, commerce between the States."

Counsel for appellants argue that here the State claims only to regulate its local rates and fixes 2 cents per mile, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the published tariff rate is practically impossible, as shown by the illustration, and the carrier must either reduce its interstate rate to conform to the State provision or submit to the practical deprivation of its revenues as illustrated.

If it be said that the carrier should stop its interstate train and evict a passenger thus seeking to evade the law, it is replied that the dilemma is not capable of such a practical solution, for the reason that a passenger tenders the intrastate rate up to the station nearest the State line, viz: Alexandria, for example, and then tenders the interstate rate from such station to his destination, Washington, for illustration, and while his real purpose was to become an interstate passenger from point of origin to point of destination, yet the law is so arranged that through the instrumentalities of the State authorities he is enable to entirely evade the requirements of the Federal authorities. If we are told, notwithstanding this, it is the duty of the carrier to refuse to carry him further, further reply is made that the agencies through which the carriers must operate are human, and no way has yet been found (and it is submitted cannot be found) to enforce the provisions of the Federal law, and it is submitted that this court will not require the carriers to do what is practically impossible, and turn them over to an alleged right which is impossible of execution.

We submit that it is within the power of the State authorities to entirely destroy and render nugatory rates,

which, after investigation, the Interstate Commerce Commission, acting under the authority of the Act of Congress, have prescribed as reasonable and just; and we contend that this presents a Federal question arising under the Constitution and laws of the United States passed pursuant thereto, which Federal question the Circuit Court of the United States sitting in equity has jurisdiction to hear and determine.

Let us illustrate with another example, using the cities of Washington and Cincinnati, and the competition between the B. & O. and the C. & O. The B. & O. being the short line (553 miles), establishes, under authority of the Interstate Commerce Commission after investigation, let us suppose a rate of $13.50, which is 2.44 cents per mile. The C. & O. is by the Interstate Commerce Commission permitted to meet this rate, and establishes the same rate of $13.50; the distance by the C. & O. being 599 miles, the rate per mile is 2.25 cents. The State of Virginia fixes the maximum of two cents per mile; the State of West Virginia fixes the maximum of 2 cents per mile, and, while the State of Kentucky has not yet done so, let us suppose the State of Kentucky fixes the maximum of two cents per mile:

The interstate fare from Washington to Alexandria is, say, fifteen cents; the interstate fare in Virginia from Alexandria to Alleghany is, say, $4.60; the interstate fare from Alleghany to Tuckahoe, the first station in West Virginia, is, say, ten cents; the intrastate fare in West Virginia from Tuckahoe to Kenova is, say, $4.05; the interstate fare from Kenova to Catlettsburg, the first station in Kentucky, is, say, ten cents; the intrastate fare in Kentucky from Catlettsburg to Covington is, say, $3.00; the interstate fare from Covington to Cincinnati is, say, ten cents.

Applying this illustration, a passenger at Washington buys a ticket for Alexandria, for which he pays fifteen cents; arriving at Alexandria, he purchases a ticket to Alleghany, or tenders the conductor the amount, $4.60; arriving at Alleghany, he either purchases a ticket or ten-

ders the conductor the fare to Tuckahoe, ten cents; arriving at Tuckahoe he again either purchases a ticket or tenders the conductor the fare to Kenova, $4,05; arriving at Kenova he either purchases a ticket or tenders the conductor the fare to Catlettsburg, ten cents; arriving at Catlettsburg he either purchases a ticket or tenders the conductor the fare to Covington, $3.00; arriving at Covington, he either purchases a ticket or tenders the conductor the fare to Cincinnati, ten cents; thus obtaining his transportation from the city of Washington to the city of Cincinnati at $12.10, which is $1.40 less than the only lawful rate, to-wit: the published tariff rate, with no way on the part of the carrier by which it can prevent it; and this result can be accomplished without the passenger leaving his seat.

Briefly, the illustration is shown, as follows:

	Distance.	Fare.
Washington, D. C., to Alexandria, Va.	7	$ .15
Alexandria, Va., to Alleghany, Va....	233	4.60
Alleghany, Va., to Tuckahoe, W. Va..	2	.10
Tuckahoe, W. Va., to Kenova, W. Va.	203	4.05
Kenova, W. Va., to Catlettsburg, Ky..	3	.10
Catlettsburg, Ky., to Covington, Ky ..	149	3.00
Covington, Ky., to Cincinnati, O.....	2	.10
Total.....	599	$12.10

Published tariff rate.....	$13.50
Cut rate.....	12.10
Difference.....	$ 1.40

The effect of this is not only to force The Chesapeake and Ohio Railway Company to take less than what the Federal authorities have established as a reasonable and just rate for the service it has rendered, but the effect is also to compel the Baltimore and Ohio Railroad Company

to still further reduce its rate, and to compel it to take for the service it performs, less than what the Federal authority after investigation has established to be a reasonable and just compensation for the service rendered.

It is thus demonstrated that the action of the Federal authorities is vain and illusory, and that the action of the authorities of the States of Virginia, West Virginia and Kentucky fixes and establishes the interstate rate regardless of what the Federal power has established.

We contend that where Federal authority, after the investigation which it is authorized to make has established a reasonable and just rate, the authorities of the States cannot establish a rate, the effect of which would be to affect directly, and thereby regulate the interstate rate, and that the Circuit Courts of the United States have full jurisdiction to inquire into and determine this question.

The instances above cited of Richmond and Washington, and Washington and Cincinnati, are merely illustrative of hundreds of thousands of similar transactions. Indeed, it may be safely stated that every single interstate movement on every railroad in the United States, whether of passengers or of freight, is governed by the same principle. The Court can thus see the tremendous effect that the action of the State authorities will have upon the revenues of the interstate carrier.

We contend that the system established by the State authorities operates as a fraud upon, and in derogation of the Interstate Commerce Clause of the Federal Constitution, and that this is not ameliorated or softened in any degree by a claim of right to make one carriage a contract of intrastate carriage, say from Richmond to Alexandria, which, having been completed, a new contract of carriage can then be made from Alexandria to Washington.

We claim that this two-cent rate in Virginia, if sustained, will eventually force the interstate carrier to reduce its interstate rate to a two-cent rate or else violate the Interstate

Commerce Law (Section 6) by carrying at a rate different from the published rate; in other words, it becomes subject to prosecution under the Elkins Act (Section 1), unless it fixes its interstate rate in accordance with the rate prescribed by the State of Virginia. A more complete and effective regulation cannot be conceived of.

The law is a sensible thing—it looks to substance, and not to form. If the railway companies were to resort to a cut-rate practice of this character, the response of the Government would be prompt and severe.

If, through the action of the State authorities, the passenger is enabled to resort to the cut-rate practice, should not the railway companies be protected in their rights under the Federal law?* The passenger justifies himself under the action of the State authorities and the contract to carry from Richmond to Alexandria wholly within the State, but in essence, it is a mere subterfuge for evading the interstate commerce law of the nation; the carrier, however, is powerless to prevent it.

Here it is manifest that the railroads are not resorting to any subterfuges for evading the Interstate Commerce law, but it is clear that under the authority of the States, the passenger can, as illustrated, get interstate transportation at less than the published interstate rate, which is the only lawful rate; and that the States may thus practically confiscate the property of these appellees unless the circuit courts of the United States have jurisdiction to inquire into the matter, and upon a proper showing, grant appropriate relief. The passenger does this under and by virtue of the act of the State authorities, and our contention is, that inasmuch as this action of the State authorities does directly affect the interstate rate, the action is beyond the power of the State authorities, and that the court below had full jurisdiction in the premises.

Cutting v. Florida Ry. & Nav. Co., 46 Fed., 641, 64
State v. Gulf, C. & S. F. Ry. Co., 44 S.W., 542, 54
Porter v. St. L. S. W. Ry. Co., 95 S. W., 453, 455.

"The constitutional validity of a law is to be tested, not by what has been done under it, but by what may be done."—Stewart *v.* Palmer, 74 N. W. 191;
30 Amer. Reps. 289;
Violett *v.* Alexandria, 92 Va. 561;
31 L. R. A. 382,
and this is clearly set out in
Sou. Ry. Co. *v.* Comth., 107 Va. 771, at page 777; 60 S. E. 72.

Respectfully submitted,

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Office Supreme Court, U. S.
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SUPPLEMENT

TO

MR. BRAXTON'S REPLY NOTE FOR APPELLANTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908

ROBERT R. PRENTIS, HENRY C. STUART AND JOSEPH E. WILLARD, individually and as constituting the STATE CORPORATION COMMISSION OF VIRGINIA, and R. T. WILSON, Clerk of the STATE CORPORATION COMMISSION OF VIRGINIA, ... Appellants

vs. No. 270.

ATLANTIC COAST LINE RAILROAD COMPANY, ... Appellee.

SAME ..... Appellants

vs. No. 271.

CHESAPEAKE & OHIO RAILWAY COMPANY, ... Appellee.

SAME ..... Appellants

vs. No. 272.

CHESAPEAKE WESTERN RAILWAY, ... Appellee.

SAME ..... Appellants

vs. No. 273.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... Appellee.

SAME ..... Appellants

vs. No. 274.

NORFOLK & WESTERN RAILWAY COMPANY, ... Appellee.

SAME ..... Appellants

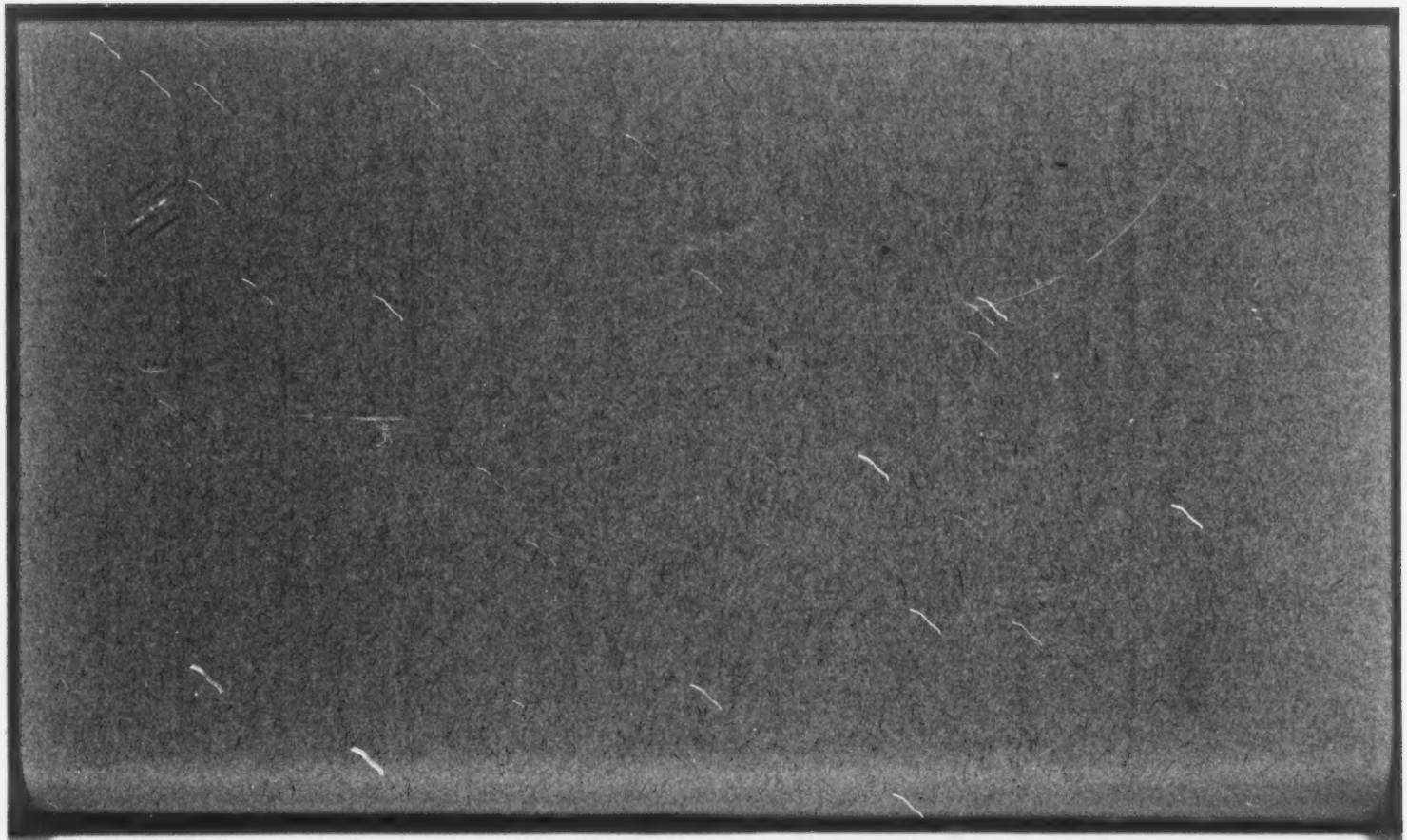
vs. No. 275.

SOUTHERN RAILWAY COMPANY, ... Appellee.

Appeals from Circuit Court of the United States for the Eastern District of Virginia

Six Cases Heard Together.

PRESS OF GIBSON BROTHERS.



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CHESAPEAKE & OHIO RAILWAY COMPANY, ... Appellee,

SAME ..... Appellants

vs. No. 272.

CHESAPEAKE WESTERN RAILWAY, ... Appellee,

SAME ..... Appellants

vs. No. 273.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... Appellee,

SAME ..... Appellants

vs. No. 274.

NORFOLK & WESTERN RAILWAY COMPANY, ... Appellee,

SAME ..... Appellants

vs. No. 275.

SOUTHERN RAILWAY COMPANY, ... Appellee.

Appeals from Circuit Court of the United States for the Eastern District of Virginia.

Six Cases Heard Together.

PRESS OF GIBSON BROTHERS.

SUPPLEMENT TO

Mr. Braxton's Reply Note for Appellants

MULTIPLICITY OF SUITS.

The charge of appellees that the danger of multiplicity of suits is greater, and the protection therefrom less, under the Virginia laws than under the old method for which they contend, is **wholly groundless.**

As I have already pointed out, there is no way, under any system, to prevent people bringing suits which cannot be sustained, except the restraining fear of being cast in the costs and other expenses of litigation—this is as great under the Virginia system as under any other.

People are no more likely to bring suits based upon a rate which has been **suspended by supersedeas,** than upon one **suspended by injunction**—the **Status of the rate is exactly the same in each case.**

Appellees speak of the danger of "tens of thousands" of suits. This is purely chimerical, and as a matter of fact never did, and never will, exist. But if it did exist under any system, the **danger of it would be actually greater under an injunction** from a Federal Circuit Court, than under a supersedeas from the Supreme Court of the State, or this Court—the reasons are these:

1st. The proceeding by injunction is not the ordinary and usual course of litigation, like an appeal, but is always recognized as a harsh, unusual, and "extraordinary remedy" —**the very existence of it indicates something wrong, something inefficent, in the ordinary machinery of government,** and the resort to it always causes friction, and popular resentment and discontent, and **breeds infinitely more popular hostility to railroads than would the orderly proceeding by appeal**—Hence the danger

of petty persecution from a multiplicity of groundless suits throughout the country would be much greater under an injunction than under a supersedeas.

2d. A Federal Court cannot enjoin by name "tens of thousands" of potential plaintiffs, nor could information of the injunction be so conveyed to more than a negligible portion of them as to make their bringing of suits against the Company based upon the enjoined rate a contempt of Court.

3d. Even if these "tens of thousands" of would-be plaintiffs should be successfully enjoined from suing on the enjoined rate, nothing could prevent their **suing on some other non-existent rate**—and the temptation to do so, and the probability of recovery thereon, would be just as great as in the case of suits brought upon the enjoined rate.

4th. In no case is a Court required to assert, sua sponte, and enforce, a defence for a defendant railroad company sued therein, and this is just as true when the suit is based upon an enjoined, as when it is based upon a superseded rate. Should it be thought wise to require Courts of their own motion to take notice that the rate relied upon has been enjoined, it would be just as easy and as practicable to require them to take similar notice of one that has been superseded.

Hence, we repeat that the ability to prevent a multiplicity of suits on a suspended rate, is no greater under the machinery for enjoining, than under the machinery for superseding the rate and the temptation to subject the Company to a multiplicity of suits based upon a suspended rate is much greater when the suspension was by injunction than when it was by supersedeas, because of the vastly greater public irritation and hostility to the Company caused by the former method of proceeding.

In connection with this alleged danger from a multiplicity of suits, the Court is respectfully requested to read also what is submitted below under the head of—

Practical Working of Appeal under Virginia Law.

So many difficulties under, and objections to, the appellate machinery of the Virginia law, have been suggested and insisted upon by appellees, which **do not, in fact, exist,** that it is believed the best way to refute these charges is to briefly go over the working of that machinery from beginning to end, so as to show **the utter groundlessness of the appellees' criticisms** of its efficiency.

Let us then take the case of an order of the Commission prescribing a rate, after the due notice and full hearing to the Company and the proceeding by due process of law which the Virginia law requires; let us suppose the Company is dissatisfied with the rate, claiming either that it is illegally low, or violates a valid contract, or regulates interstate Commerce or is in any respect whatever invalid. What, then, is the relief afforded by the Virginia law?

I.

The Company may, **as of right,** take an **appeal** from the order of the Commission to the Supreme Court of Appeals of the State, where all judicial questions affecting the validity of the rate may be reviewed (Va. Const., sec. 156, sub-sec. (*d*); Rec. p. 87).

This appeal is heard upon the record as made before the Commission; but if, for any legitimate cause such as surprise, fraud, after discovery of evidence or the like, the Company may have failed to get some of its evidence in before the Commission, the case may be **sent back to the Commission** so that such **omitted evidence may be introduced,** heard and acted upon by the Commission before coming back to the Appellate Court (Va. Const., sec. 156, sub-sec (*f*); Rec. pp. 88–9).

Should the Commission, at any time, err in **any** of its rulings whether on the admission or rejection of evidence, or otherwise, the Company may **have the ruling reviewed** on appeal (Va. Const., sec. 156, sub-sec. (*d*); Rec. p. 87; Act of April 15th, 1903, sec. 34; Rec. p. 103).

All evidence adduced before, or considered by, the Commission, which any partyi n interest may desire to have certified, **must be certified** to the Appellate Court, for its review, and there shall also

be certified by the Commission "the reasons upon which the action appealed from was based," so that the Appellate Court can not only review the facts and evidence, but can also correct the action of the Commission if found to have been based upon any illegal reason or mistaken conception of the law (Va. Const., sec. 156, sub-sec. (*f*); Rec. pp. 88–9); see also Clerk Wilson's certificate as to certifying the evidence in these cases (Rec. p. 120); and the opinion of the Commission giving "the reasons upon which" was based its rate order complained of here (Rec. p. 132).

Such appeal is **given precedence** over all other appeals on the docket, except habeas corpus and commonwealth cases already on the docket (Va. Const., sec. 156, sub-sec. (*e*); Rec. p. 88).

Any person, other than the corporation—such, for instance, as a stockholder or bondholder of the Company—who may deem himself aggrieved by the Commission's order, may appeal therefrom just like the Company could do (Va. Const., sec. 156; sub-sec. (*d*); Rec. p. 87).

Such appellate proceedings may be taken at any time **within six months** from the date of the order appealed from (Act of April 15th, 1903; sec. 34; Rec. p. 103).

Upon such appeal shall be reviewed, considered and determined "the **reasonableness,** and **justness** of the action of the Commission appealed from, as well as any other matter arising under the appeal" (Va. Const., sec. 156; sub-sec. (*f*); Rec. p. 88).

It is submitted that these provisions leave nothing that could be asked for in the matter of appeal; surely they are by far the most liberal provisions for appellate review that any other interest in Virginia—including the very lives of her citizens—have now or ever did have.

In practically all other cases, the appeal may or may not be allowed by the Appellate Court; in the case of rates it is "of right."

In other cases, the amount involved must be at least $300.00; in rate cases, the appeal is irrespective of amount;

In other cases, no new evidence can be brought in after appeal taken; in rate cases, the cause may be sent back for further evidence as above shown;

In other cases, the **nisi prius** Court is not required to certify the

"reasons on which its action was based;" in rate cases this valuable check and safeguard is afforded;

In other cases, no one but a formal party to the proceedings below can appeal; in rate cases, "any person deeming himself aggrieved" may appeal;

In other cases, the *nisi prius* Court may, in its discretion, certify the facts or the evidence before it; in rate cases, it must certify all **evidence** required by any party.

All other cases must await their turn on the docket of the Appellate Court at the particular place of session in that part of the State where the lower Court sat; in rate cases the appeal must be heard at once regardless of the place of session.

So much, then, for the liberality and sufficiency of the Virginia law for obtaining an adequate review of a rate-making order of the Commission.

II.

The appeal having thus been taken, let us see how it may be disposed of.

Obviously the Appellate Court must either affirm or disaffirm the order appealed from. We will consider the two cases separately.

(*a*) Where the Appellate Court **finds no error** in the order appealed from, it simply affirms it, and that is an end of the matter, unless the Company desires to appeal to this Court on any Federal question involved, which it of course may do just as in any other case of appeal to this Court from the highest court of any State having jurisdiction of the matter.

(*b*) Where the State Court of Appeals **finds error** in the order appealed from, the State law simply requires that it shall **correct such error.**

Appellees speak of this as a most unheard-of thing; yet nothing is of commoner occurrence. The occasion for this provision and its reasonableness and practicableness are pointed out in my principal note at pages 147 *et seq.*, to which the Court's attention is respectfully invited.

In the cases involved here, the defenses asserted and some

which might have been asserted by the carriers were as follows:

1. That the State was precluded by contract from making any rates for them. Can it be that should the Appellate Court sustain this defence, there would have been anything impracticable in that Court itself **cancelling the whole rate,** upon deciding that it was invalid in toto?

2. The carriers may have insisted that because of the necessary effect of intra-state rates upon inter-state commerce, the State's supposed power to regulate intra-state railroad rates does not in fact exist. Should this defence be sustained by the Appellate Court, could there be any difficulty about that Court itself **cancelling the whole rate,** upon deciding it to be invalid in toto?

3. The carriers insisted here that the rates prescribed regulate certain inter-state rates, because the State rate, as prescribed (two cents) is lower than the inter-state rate affected (three cents), and that therefore the inter-state rate is illegal in such case; should the Appellate Court sustain this defence, would there be any embarrassment in that Court, thereupon, itself **prescribing a three-cent intra-state rate, so as to conform to its own judgment and decision?**

4. Suppose, on the other hand, the Commission had by its order provided expressly that the rate fixed by it should apply not only to intra-state traffic but also to the intra-state portion of an inter-state movement, or exclusively to the latter; can it be conceived that there is any reason why an Appellate Court could not only declare such an order erroneous, but, **itself, correct the error ?**

5. Finally, suppose the rate be objected to solely on the ground of its being too low; it is difficult to suppose a court being possessed of sufficient evidence to say that a certain rate is below the legal limit, without being able to say also from the same evidence what that limit is. But if the evidence does not suffice to show what (at least in the opinion of the Carrier) is the legal limit of the reduction which the State may make in its rates, is any one but the Carrier responsible for such deficiency in the evidence, seeing what ample opportunity is given it to introduce all the evidence it may desire?

But suppose the evidence does not, in fact, show what is the legal limit of permissible reduction; the Appellate Court may send

the case back to the Commission for further evidence on that point before deciding the appeal (Va. Const., sec. 156; sub-sec. (*f*); Rec. p. 88–9.

Let us assume, however, that the Appellate Court (either without sending the cause back to the Commission for further evidence, or else after doing so) should decide that the evidence before it showed a given rate—say 2½ cents—to be above the legal limit of the State's power of reduction, and should accordingly enter a decree amending the Commission's order by substituting two and a half cents, for two cents, therein. Suppose this should be done; then if the Carrier be dissatisfied, may it not appeal to this Court?

Appellees insist that this Court would be embarrassed or obstructed in dealing with, or disposing of, such an appeal. Can such possibly be true?

Suppose the two and a half cent rate had been prescribed by the Commission in the first place, and then affirmed by the State Supreme Court and appealed thence to this Court; or had been affirmed by a **Federal** Court and appealed thence to this Court, would not the situation, so far as concerns the appeal in this Court, have been exactly the same? That is, would not this Court, upon appeal from a decree (of either a Federal or a State Court) **affirming a rate** fixed by a commission or legislature, have to decide, from the evidence in the record, whether or not the rate affirmed be unreasonably low? And is not that exactly what, and all that, this Court would have to do in case of appeal from a decree which **prescribed,** rather than **affirmed** a rate?

How could it possibly concern this Court or affect an appeal herein that the decree appealed from **prescribed** the objectionable rate, rather than **affirmed** it? In either case, would not the validity of the rate have to be tested by the evidence in the record? And is there any conceivable evidence bearing upon the subject which, under the Virginia laws, the carrier would have any difficulty in putting into the record?

If therefore, the Virginia Supreme Court, upon reversing an order of the Commission fixing rates, should correct the error by substituting a proper for the improper rate prescribed by the Commission, could and would not its own decree be reversed on appeal

by this Court if not sustained by the evidence in the Record just as readily as if it had merely affirmed an illegal rate prescribed by the Commission?

Of course the provision in the Virginia laws for the Appellate Court of that State correcting an order of the Commission which it has found upon appeal to be erroneous, can not affect in the remotest degree the powers or functions of this Court upon an appeal from the State Court.

The action of the Virginia Corporation Commission is presumed **prima facie,** to be correct (Va. Const., sec. 156, sub-sec. (*f*); Rec. p. 89); therefore the action of the Virginia Court of Appeals in changing an order of the Commission (in correcting it, as well as in reversing it) must be **affirmatively** supported by the Record: that is to say, that the Record must **affirmatively** show, not only that the rate fixed by the Commission was wrong, but also that the correction of that rate, made by the Appellate Court of Virginia, was right. Hence it follows that on an appeal by the Carrier to this Court from a decree of the Virginia Appellate Court correcting a rate made by the Commission,—on such an appeal to this Court, an insufficiency of the evidence in the Record to **affirmatively** support the correction made in the rate by the Virginia Appellate Court, would be fatal to such correction (an obvious advantage to the appealing carrier); and this Court by its own decree could then either expressly, or by necessary implication, condemn as invalid, both the rate fixed by the Commission and the correction thereof made by the Virginia Appellate Court.

The contention of appellees that a court can only condemn and cannot correct, a rate (that is, cannot be given such power even by the Constitution of a State), is tantamount to saying that if A sues B for a thousand dollars, and proves only nine hundred and fifty, he cannot recover judgment therefor; because forsooth, B having been summoned to answer a claim for one thousand dollars, has had no due process of law as to a claim for nine hundred and fifty.

This, of course, can never be. The utmost that B could insist upon is that when summoned to answer a claim for one thousand dollars no judgment should be rendered against him for **more** than that amount. And so, in rate-making, when a carrier is summoned

to show cause against a two-cent rate, the utmost it can insist upon is that no rate for **less** than two cents can be decreed against it.

III.

The gravamen of all the suits brought by Carriers to enjoin state-made rates, pending an enquiry into their validity, has been the danger of penalties being incurred pending the investigation.

No such danger need be incurred in Virginia, but is most carefully, elaborately and efficiently provided against by the laws of that State.

A carrier does not always desire to suspend a rate while testing its validity. Therefore, in Virginia, the carrier may if it chooses appeal from a rate-making order of the Commission, without suspending the effect of the order, but voluntarily obeying it pending the appeal.

On the other hand, should the carrier desire that the order be suspended pending an appeal therefrom it may readily obtain, as a matter of right, a supersedeas thereto as provided by Va. Const. sec. 156; sub-sec. (*e*); Rec. p. 87, and as explained at length in my principal note on pages 150 **et seq.**, to which the Court's attention is respectfully invited.

Appellees charge however that the Commission may itself defeat the effect of this suspension by prescribing an impossible system of accounts to be kept by the carrier, pursuant to Va. Const., sec. 156; sub-sec. (*e*); Rec. p. 88. To this we reply:

> (*a*) It is not to be presumed (as this Court has said) that a State Commission is going to improperly use its powers to wantonly oppress the carriers—no such case is involved here and it will be time enough to deal with it when (if ever) it arises.
>
> Reagan *v.* Farmers Loan and Trust Co. 154 U. S., p. —

> (*b*) Should the Commission make an unreasonable order in reference to the accounts to be kept and the reports to be made, pending an appeal, such order could and would be promptly corrected on appeal and in the meantime be itself suspended by supersedeas. Appellees'

understanding to the contrary is clearly erroneous. See Va. Const., sec. 156; sub-sec. (*d*); Rec. p. 87; and Act of April 15, 1903; sec. 34; Rec. p. 103.

(*c*) Even in the absence of a technical appeal, the Appellate Court could and certainly would, by *certiorari* or otherwise, protect its supersedeas order from an abuse of its powers by the Corporation Commission.

But, say the appellees, the supersedeas will not protect them against a multiplicity of suits. We have shown above that it is just as efficient for this purpose as an injunction or any other writ *can* be.

The supersedeas absolutely suspends the operation of the rate. Whether the rate be ultimately sustained or be overthrown, it has absolutely no force during the time it was suspended by the supersedeas, except that, by virtue of the suspending bond, the Carrier may have to refund the difference between the rate actually collected by it during that period and the correct rate as ultimately fixed.

Let this point be made clear to the Court: Under no circumstances can any penalties accrue, or public or private rights arise, upon a rate during the period when it is, or was, suspended, except only the obligation of the Carrier to refund overcharges, as provided in the supersedeas bond.

As above pointed out, an appeal from a rate order may be taken by the Carrier at any time within six months after it is entered and a supersedeas suspending the operation of the rate may be taken out at any time, pending the appeal, or not at all. If, therefore, at any time after a rate order becomes effective and before it is suspended, a cause of action arises to a patron because of the Carrier's failure to observe the rate, such patron is not prevented from suing on it by the fact that the Carrier may, **at some later time,** obtain a suspension of the rate by supersedeas, any more than by the fact that it may at some later time obtain a suspension by injunction.

But if, while such suit be pending, a suspension of the rate be obtained by supersedeas, then such suspension of the rate operates also to suspend all pending suits based upon the rate (Va. Const., sec. 156; sub-sec. (*h*); Rec. p. 89).

Could more be done in case of an injunction? Could the Carrier prevent the bringing of suits against it upon a rate merely because the Carrier **might thereafter** enjoin the rate? Or, when such suit is brought, could the Carrier require its dismissal or anything more than its suspension, upon obtaining only a **temporary** injunction against the rate?

Upon the decision of the appeal, should the rate be sustained, the patron's suit based on the rate then proceeds; just as it would do in event of an injunction suit, if upon the final hearing, the temporary injunction be dissolved.

On the other hand, if, upon the decision of the appeal the rate be overthrown, then the patron's suit based upon the rate would be dismissed; just as if, in case of an injunction suit, the injunction should be perpetuated.

Thus it will be seen that so far as concerns suits which might be brought by patrons against a carrier based upon a State-made rate, the carrier has every protection, if not more, from a supersedeas that it could possibly get from an injunction.

As above pointed out there is no way to keep people from **bringing** suits; but if a suit based upon a State-made rate should be brought for a cause of action arising at a time that the rate was suspended by supersedeas, it is clear that it could not be maintained even after the rate is held to be valid; because, regardless of the result of the appeal, the rate is never effective, and is never made so retroactively, during the period in which it is suspended by supersedeas—except in the matter of refunding over charges as provided by the supersedeas bond.

We submit therefore, that any dangers from suits or penalties based on the rates involved here, from which the carriers were protected by the injunctions below, that they could not have been protected from just as well by the supersedeas of the Virginia Appellate Court, and upon further appeal, by the supersedeas order of this Court, exist only in the minds of appellees' counsel.

Demurrage Rules.

Counsel for appellees, on the 14th instant, filed an addendum to their note, in which they refer to the two cases from the Virginia Court of Appeals concerning certain Demurrage and Car Service

Rules prescribed by the Commission; but the conclusions drawn by counsel for appellees from these two decisions, are, we respectfully submit, wholly erroneous and untenable.

The first case (A. C. L. Ry. *v.* Com., 102 Va. 599) was of this nature:

The Corporation Commission some years ago prescribed some fifteen or twenty Rules for Demurrage and Car Service by the railroads of Virginia. Before prescribing them all the railroads were given an elaborate hearing on them, and as a result of such hearing, many modifications were made in the rules as originally drafted for consideration by the Commission.

The carriers made objection to some of the Rules as proposed, on the ground that they were unreasonable and unjust. These objections were heard, considered and disposed of by the Commission and their decision thereon was affirmed on appeal to the Supreme Court of Appeals in the case just quoted (A. C. L. Ry. *v.* Commonwealth).

The carriers also objected to the validity of all the rules because they did not expressly limit their operation to intra-state business. The Commission, in disposing of this objection, declined to insert in each rule express language saying that it was not applicable to inter-state business, because it held that the proceedings then before it involved only the **making** of reasonable Demurrage and Car Service Rules, not the enforcing of them, and that the question as to whether such reasonable rules, when made by the Commission, could be applied to inter-state commerce, should be determined only when, and if, they or any of them should be sought to be so applied, and in the proceedings in which such application might be attempted.

The Commission took the position that as to whether a regulation is in and of itself a reasonable regulation and therefore within the power of the State to make, is one question, but as to how far, if at all, such valid State regulation could be applied to inter-state traffic, was an entirely different question. That only the former question was **coram judice** the Commission in the proceeding for **prescribing** the rules; while the latter question, being one of the **application** of such regulations (previously adjudged valid), was for consideration more properly in subsequent proceedings for their enforcement in specific and concrete cases.

especially in view of the fact that under some circumstances, such State regulations might, and, under others, might not, be legally applicable to inter-state commerce.

This view was approved by the Appellate Court, and, when the language of its opinion is read in the light of these facts, it will be seen that it is in nowise inconsistent with its elaborate opinions as to the character of the Corporation Commission and the nature of its proceedings contained in the cases of Comlth. *v.* A. C. L. Ry., 106 Va. 61, and Winchester &c. Co. *v.* Commonwealth, 106 Va. 265.

Certain language of the Virginia Court in the case of A. C. L. Ry. *v.* Comlth., 102 Va. 599, cited by counsel for appellees, in which the Court refers to illegal application of the demurrage rules to inter-state commerce being corrected by the Federal Courts, is (as we respectfully submit) wholly misconstrued by appellees' counsel.

Upon reading the case, especially in the light of the foregoing facts, it is clear that nothing was further from the mind of the Virginia Court of Appeals, than the issuing of an injunction by a Federal Circuit Court against the Virginia Court—the Corporation Commission—an appeal from which court that Court of Appeals was then engaged in hearing.

It will be observed that these Car Service and Demurrage Rules may be made the basis of a proceeding before the Commission to fine the Carrier for disobeying them and from the judgment of the Commission in such a proceeding an appeal would lie, first to the Supreme Court of Virginia, and thence, on a Federal question (such as the illegal application of such rules to inter-state commerce) to this Court. This (except the appeal to this Court) was exactly what was done in the second case cited by appellees (Southern Ry. *v.* Comlth., 107 Va. 771).

Again, said Demurrage and Car Service Rules may be made the basis of private suits against the carrier in any State Circuit Court. Such suit may in some instances be brought originally in a Federal Circuit Court, or be removed there from a State Circuit Court, or if not so removed, may find its way, through the State Courts, to this Court, on the question of the legality of an application of the rules in question to inter-state Commerce

Thus we see there was ample occasion for the Virginia Court of Appeals to refer to parties resorting to the Federal Courts to resist an illegal application of these State-made Demurrage and Car Service Rules, without having in mind or remotely dreaming of such resort being by a bill to enjoin proceedings in a State Court or reopen a matter judicially concluded between the parties, such as the intrinsic reasonableness of the rates, and not their applicability to inter-state commerce which last matter both the Commission and the Appellate Court had expressly refused to pass on in the proceedings to prescribe the rules and which therefore remained an open question for any court, State or Federal, to thereafter decide.

That the provisions of the Va. State Constitution for proceeding against a carrier by due process of law in the enforcement of the rates or regulations theretofore prescribed, were not intended to destroy the **finality** of what had been decided as against such carrier in the proceedings to prescribe the rates or rules, has been fully pointed out on pages 158–9 of my principal note to which the court's attention is respectfully invited.

That the interpretation given by appellees' counsel to the action and language of the Va. Appellate Court in the demurrage cases is not correct, is fully shown by the elaborate and unmistakable language of that Court in the two cases in 106 Va. above referred to, elaborate extracts from which will be found on page 149 of the Note of Attorney-General Anderson for appellants, and on pages 96 and 142–3 of my principal note.

Respectfully submitted.

A. CAPERTON BRAXTON,
Of Counsel for Appellants.

RICHMOND, VA.,
October 15, 1908.

Office Supreme Court, U. S.
FILED.
OCT 28 1908
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

ROBERT R. PRENTIS ET AL., *Appellants*,
v.
ATLANTIC COAST LINE RAILROAD COMPANY. } No. 270.

ROBERT R. PRENTIS ET AL., *Appellants*,
v.
THE CHESAPEAKE & OHIO RAILWAY COMPANY. } No. 271.

ROBERT R. PRENTIS ET AL., *Appellants*,
v.
CHESAPEAKE WESTERN RAILWAY. } No. 272.

ROBERT R. PRENTIS ET AL., *Appellants*,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY. } No. 273.

ROBERT R. PRENTIS ET AL., *Appellants*,
v.
NORFOLK & WESTERN RAILWAY COMPANY. } No. 274.

ROBERT R. PRENTIS ET AL., *Appellants*,
v.
SOUTHERN RAILWAY COMPANY. } No. 275.

REPLY BRIEF FOR APPELLEES.

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SUPREME COURT OF THE UNITED STATES

October Term, 1908.

Robert R. Prentis et al., *Appellants*, v. Atlantic Coast Line Railroad Company.	No. 270.
Robert R. Prentis et al., *Appellants*, v. The Chesapeake & Ohio Railway Company.	No. 271.
Robert R. Prentis et al., *Appellants*, v. Chesapeake Western Railway.	No. 272.
Robert R. Prentis et al., *Appellants*, v. Louisville & Nashville Railroad Company.	No. 273.
Robert R. Prentis et al., *Appellants*, v. Norfolk & Western Railway Company.	No. 274.
Robert R. Prentis et al., *Appellants*, v. Southern Railway Company.	No. 275.

REPLY BRIEF FOR APPELLEES.

Procedure in Virginia for the Fixing of Rates.

Under the Virginia system the course of procedure to fix a schedule of rates is set out in sub-section (*b*) of section 156 of the Constitution, and is as follows:

The Commission is required to give notice of "the time and place, when and where the contemplated action in the premises will be considered and disposed of," and to give a reasonable opportunity to any party affected "to introduce evidence and to be heard thereon."

At the time and place fixed by the notice, the Commission has a hearing on the question whether or not its "contemplated action"—the thing it already has in view—will be taken: that is, whether or not the rate it has in contemplation shall be fixed. Thereupon, if the Commission determines to make the schedule of rates theretofore contemplated, it enters an order fixing the schedule of rates, and, if it is a general order (such as was made in this case), the Constitution requires that "every such general order, rule, regulation, or requirement shall be published at length" once a week for four successive weeks in a newspaper of general circulation published in the city of Richmond, Virginia, before it shall go into effect.

Procedure in Virginia in the Enforcement of Rates After They Have Been Made and Published.

The Virginia proceeding from this point on, so far as taken before the Commission, is as follows:

After the rates are made and published, as hereinbefore recited, if any railroad company fails or refuses to observe the order fixing them, the Commission is given, by sub-section (*c*) of section 156 of the Constitution, the power to cite the company before it and, in a proceeding in which is to be determined the validity and reasonableness of the order or requirement as well as the liability of the company for the alleged violation, to enforce the order by means of fine, if the company be found guilty.

STAGE AT WHICH THE BILLS WERE FILED.

As will appear from the records in these cases, the schedule of passenger rates of which complaint is now made was fixed on April 27, 1907, by the order of the Commission, and the Commission in the concluding paragraph of such order directed as follows:

> "It is Ordered, That the Clerk of the Commission do forthwith publish this order in full in one of the newspapers of general circulation published in the City of Richmond, once a week for four successive weeks, as required by law."
>
> See page 71 of Supplemental Brief for Appellees, page 87 of Brief of Argument of Appellees, and page 9 of Southern Railway Record.

This publication at the time the bills in these cases were filed had already been made two of the four times required by law, and the injunction was against the publication of and against the taking of any other steps whatever to enforce this order.

THE ORDER, THE PUBLICATION OR OTHER ENFORCEMENT OF WHICH WAS RESTRAINED IN THESE CASES WAS A FINALITY.

The order under which the publication was made was a final order; it was in a shape in which it could have been appealed from. This is conclusively shown by a case in which the Commission had made rules which were likewise required to be published before they could go into effect, and in which an appeal was taken to the Supreme Court of Appeals of Virginia before publication (Atlantic Coast Line R. Co. *v.* Commonwealth, 102 Va., 599).

The order was actually being published, two of the four publications having been made, and if all the publications had been made, it could have been made the basis of a great multiplicity of suits against the complaining companies to enforce its provisions, and could also have been made the basis of the subsequent action before the Commission above mentioned. So that when the injunctions were awarded in these cases the threatened invasion of property rights through the medium of rates theretofore fixed was exactly at the stage at which the bills were filed or the injunctions awarded in the Reagan case, 154 U. S., 362; in the Tompkins case, 176 U. S., 168; in the Dey case, 35 Fed. 866; in the Keyes case, 91 Fed., 47; and in all the other cases in which an injunction has been obtained against the publication or other enforcement of rates claimed to be confiscatory. It cannot therefore be claimed that the suits were instituted prematurely in the cases at bar any more than it could have been claimed in the similar cases just referred to, on which these suits were based. (See page 35 and also pages 70 *et seq.* of Supplemental Brief for Appellees.)

The stage where the Commission is required to institute proceedings before itself, as outlined above, had never been reached, as it will be noted, when the bills in these cases were filed. Under the Virginia law, the Commission may give notice and fix a rate and publish it, and the subsequent proceedings for its enforcement must be before itself. In the Reagan case and in the other cases mentioned the Commission was authorized to fix a schedule of rates, and the subsequent proceedings for the enforcement of the rates so fixed were before another tribunal. In these latter cases the enforcement of the rates was halted before the matter got into the tribunals which were authorized to enforce the rates. In the Virginia case, the enforcement of the rates was likewise halted at exactly the same stage and before the matter

got as a suit into the tribunal which was authorized to enforce them.

In Chicago & St. Paul Co. *v.* Becker, in 35 Fed., 833, where Mr. Justice Brewer, then Circuit Judge, granted a final decree, the proceedings in the United States Circuit Court were maintained, although the law of Minnesota, by the act of 1887 relating to the Minnesota commissioners, who were parties defendant, provided that the corporation feeling itself aggrieved by the action of the Commission might take an appeal to the district court of the State. In this case the remedy by appeal afforded by the State law was not followed, but an injunction was awarded in the United States Circuit Court, notwithstanding the remedy by appeal to the State court.

In Northern Pacific Ry. Co. *v.* Keyes, 91 Fed., 47, chapter 115, section 32, of the laws of North Dakota of 1897 provided that "any railroad may appeal to the district court of the proper county in the judicial district of this State from which the complaint arose," etc., and "the district court shall upon hearing of such appeal receive and consider such evidence as may be introduced by either party, and shall rescind, modify or alter said order appealed from in such manner as may be equitable and just. Any railroad * * * may appeal from the decision of the district court to the Supreme Court of this State," etc. Likewise in this case an injunction was awarded by the Circuit Court of the United States when no appeal had been taken under the statutes above referred to, and notwithstanding the remedy by appeal which these statutes afforded.

This same course of proceeding was followed in the case of Western Union Telegraph Co. *v.* Myatt, 98 Fed., 335, in which the 34th section of the statute of Kansas, creating the court of visitation, provided that the final decrees of the court of visitation "shall be reviewable by the Supreme Court in like manner as judgments of the district court. The Supreme Court may in its discretion stay the issuing of any writ or process to carry the decree into effect pending the

appeal, but such stay shall not affect the use, conclusiveness, or exclusiveness of any such decree as evidence in any case or proceeding."

McNEILL CASE, WHERE INJUNCTION WAS APPROVED BY THIS COURT, NOTWITHSTANDING THE COMPLAINANTS HAD NOT AVAILED THEMSELVES OF THE APPEAL ALLOWED BY THE STATE STATUTES.

In further answer to the suggestion that the bills in these cases were prematurely filed, it is desired to call attention, in addition to the authorities cited above, to a case where the suit was brought at the same stage as in the cases at bar and where the course adopted was approved by this Court. We refer to McNeill *v.* Southern Railway Co., 202 U. S., 543.

In that case the order of the Commission was made and was about to be executed when an injunction was sued out. In the cases at bar the order of the Commission had been made and was about to be executed when the injunction was sued out. In the McNeill case the Commission was denominated a court, although in the legislative matter therein complained of, and the enforcement of it, it was no more a court than is the Virginia Commission when engaged in the legislative matter of making a rate or in the ministerial act of enforcing it. The law of North Carolina had, however, provided (in section 1074) for an appeal from the Commission in respect to the order involved in the suit, first, to the Superior Court, and then (by section 1077) to the Supreme Court of the State. The act creating the North Carolina Commission provided that the appeals above referred to should all be heard upon the same evidence as that which was heard by the Commission.

It will, therefore, be seen that under the case of McNeill *v.* Southern Railway Company, 202 U. S., 543, the time of bringing a suit to prevent the invasion of property rights was fixed at the time when the order against the enforcement

of which the injunction was sought had been entered and was about to be enforced, and before a proceeding in any court to enforce it and before the taking of any appeal in respect to it. Such authority as the McNeill case, decided by the Supreme Court of the United States, could not be disregarded by the complainants in these cases in the matter of the time at which their bills should be filed. It will further be seen from the case of McNeill *v.* Southern Railway Company that in North Carolina the direct method is provided for appeal up to the highest court of the State from any action of the Commission complained of, just as in the Virginia case, and yet in the North Carolina case a circuit court of the United States enjoined the act before the appeal was taken, and it was expressly declared, with the approval of this Court, that the Circuit Court of the United States had jurisdiction to entertain the suit and to stop the enforcement of the order at the time it did so, and before any appeal was taken, and that it was not necessary to follow the proceeding under the State law, but that the jurisdiction of the Circuit Court of the United States in equity was independent of the State law.

Second Proceeding by Commission not Analogous to a Contempt Proceeding.

It is suggested that, as the second proceeding before the Commission is to enforce its own orders, such proceeding is in the nature of contempt, and that this indicates that its previous order was a judgment. The Constitution itself conclusively shows that this is not the case. It provides in subsection (*c*) of section 156 that the Commission shall have power to enforce compliance with any of its lawful orders by the second proceeding outlined above, but in such proceeding, viz., the one to enforce the rates, it is required to *inquire into and determine the validity, justness and reasonableness of the order it is seeking to enforce*. In no pro-

ceeding for a contempt is the justness or reasonableness of the order of the court which has been defied ever permitted to be called in question.

WHETHER OR NOT A TRIBUNAL IS A COURT WITHIN THE MEANING OF SECTION 720 WHEN TAKING ANY ACTION THAT MAY BE UNDER CONSIDERATION, IS NECESSARILY A QUESTION FOR THE UNITED STATES COURTS TO DECIDE.

Section 720 is a statute of the United States which affects the jurisdiction of the courts of the United States and necessarily, therefore, the United States court must construe it and determine its meaning. It will not permit the legislature of a state to say that a tribunal of that state is a court when in fact it is not, if the result of such action on the part of the state legislature would be to take from the Federal court a part of its rightful jurisdiction. In other words, the Federal court will construe the Constitution of the United States and the statutes of Congress, and will not permit any other tribunal to abridge their jurisdiction by any construction of the legislature of such state in respect to them. If the courts of the United States will not permit the legislature to impair their jurisdiction by a legislative construction of what constitutes a court, they certainly will not permit the courts of a state to impair the Federal jurisdiction by determining what is a court within the meaning of section 720.

Whether or not, therefore, the Virginia Commission was a court when making the rates in controversy, when that question is raised to defeat the jurisdiction of the Federal courts, is one which the Federal courts alone can determine. It has been pointed out in the supplemental brief of the Appellees in this case (pages 13 to 39), and in the main brief (pages 65 to 116), that the Virginia Commission is not a court when legislating a rate or when taking ministerial steps to enforce it, these acts being prior to the time when it sits as a court to consider and pass on the reasonableness and justness of its own legislative actions, and, if found to

be reasonable and just, to enforce them by fining the delinquents. The things enjoined in this case are the steps of publication and other steps to enforce the rates, before any proceeding in a court to enforce these rates.

Order of Commission Legislative under Interpretation of Supreme Court of Appeals of Virginia.

But it may be a matter of interest to observe that the decisions of the Supreme Court of Appeals of Virginia sustain our contention, for that court has expressly determined that in making such a rule or regulation for future conduct as a rate (for a rule or regulation in respect to demurrage stands on the same basis as an order prescribing a rate under the Virginia Constitution, so far as the question of whether or not it has the force of a judicial judgment is concerned) the Commission is exercising legislative and not judicial functions. (See Supplemental Brief for Appellees, p. 45 *et seq.*) That court has held (with respect to demurrage rules which the Commission had prescribed after a notice and a hearing):

> "We are further of the opinion that the question of their validity, so far as affected by the Constitution of the United States, may be raised and determined in any case in which that question could be raised and determined if the rules and regulations in question had been enacted as statutes by the General Assembly, except as prohibited by sub-section (*d*) of Section 156 of the Constitution." (Which sub-section is not in point here, and has no relation to this matter.)
>
> Atlantic Coast Line R. R. Co. *v.* Commonwealth, 102 Va., 621.

This is expressly reaffirmed in the latest case that has gone before the Virginia Supreme Court of Appeals on this question; namely, Southern Railway Co. *v.* Commonwealth, 107 Va., 771.

It is claimed, however, that the contrary was held by the same court in the case of Commonwealth *v.* Atlantic Coast Line Railroad Co., 106 Va., 61. It may be said, in respect to this contention, that that case was decided prior to the case in 107 Va., just alluded to, and that it was not intended to overrule what is above quoted from Atlantic Coast Line Railroad Co. *v.* Commonwealth, in 102 Va., is apparent from the fact that the decision in 102 Va. is expressly reaffirmed in 107 Va. Moreover, the quotation relied on by the Appellants to sustain their position that the Virginia Court of Appeals has determined the Commission to be a court when making rules and regulations and adopting rates is a mere dictum, a careless quotation from the Commission's own holding; it had no relation to the matter to be decided and has no place in the decision. The matter to be decided was whether or not the Commission could, sitting as a court, enforce a *statutory* obligation of a railroad company, and manifestly the question whether or not the Commission was sitting as a court when it made rules or fixed rates of its own could have no relation to the question in the case. But, be this as it may, the decision of the Supreme Court of Appeals of Virginia in 107 Va., above alluded to, where it reiterates that such actions of the Commission, so far as they relate to the Constitution of the United States, stand as statutes enacted by the General Assembly, states the present law of Virginia as interpreted by its highest court.

AT THE TIME THE BILLS IN THESE CASES WERE FILED NO COURT HAD TAKEN JURISDICTION OF THE MATTERS IN CONTROVERSY.

It is claimed, as we understand it, that because the Commission of Virginia had undertaken to fix the rates involved in these cases, and as a preliminary to such legislation had held a hearing in respect to their reasonableness and justice, that therefore a court of Virginia had taken cognizance of the cases before the bills in these cases were filed. We have

pointed out in our briefs in this cause that it is not permitted to regard the notice and a hearing which may be the basis of a legislative act as a judicial act, and that because such a hearing upon notice has been undertaken a court has assumed jurisdiction of the cause. As was said by this Court in the Tompkins case, 176 U. S., 362:

> "It is not the function of the courts to establish a schedule of rates."

From this it is apparent that the notice and hearing preliminary to the making of a rate is no part of a judicial proceeding, but still remains a part of the legislative proceeding. Otherwise, it would be a convenient device to destroy the power of any Federal court to give protection against unwarranted invasions of property, forbidden by the Fourteenth Amendment to the Constitution of the United States, if a State could, by simply providing for a notice and a hearing before a law is made, be thereby considered to have taken jurisdiction of the matter by one of its own courts, and thus to have effectually destroyed any power of the Federal court to give relief against it after it became a fact.

It is perceived in this proceeding that no right to ask for relief from a Federal court could arise until after the State "court," according to the contention of the Appellants, had already jurisdiction of the subject-matter, because it takes jurisdiction of a subject-matter which is not in existence until it acts, and a Federal court can only have jurisdiction after the legislation complained of has been enacted. (See Supplemental Brief for Appellees, pp. 27 *et seq.*)

Difference Between Due Process of Law in a Rate Case and Due Process of Law in a Tax Case.

It is claimed by the Appellants that the summary proceedings permitted in tax cases afford a prototype to the proceedings authorized by the Virginia Constitution in the fix-

ing and enforcing of rates which justifies the denial to a company for which confiscatory rates have been fixed of the right to judicial relief. That a judicial investigation after the rate is fixed is necessary to due process of law as against a confiscatory rate will appear from the Supplemental Brief of the Appellees beginning at page 51, and from the main brief beginning at page 38.

What constitutes due process of law in tax cases is entirely different, and is based on entirely different principles. The rule that due process of law in rate cases requires an inquiry and an investigation according to judicial methods was laid down in the Minnesota case in 134 U. S. (p. 460), by Justice Miller and has ever since been followed. Likewise Justice Miller in State Railroad Tax cases, 92 U. S., 613, laid down the principles of what constitutes due process of law in tax cases. Referring to Section 3224 of the Revised Statutes of the United States providing as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court;"

Justice Miller, speaking for this Court, said:

> "Though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice."

The principles underlying the determination of what is due process of law in tax cases can be seen from the case

just quoted, and also from the case of Murray *v.* Hoboken Land Co., 18 Howard, 282, where it is said:

> "It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties; but always in some way observed and yielded to."

Additional emphasis is given the distinction under discussion by the fact that Justice Miller, who announced the doctrine of this Court on the subject of taxation (in 92 U. S.), also announced the principle which this Court approves as to what constitutes due process of law in rate cases (in 134 U. S.), which latter principle has been approved in every decision of this Court since that time. It would be quite as reasonable and logical for us to argue in a tax case that what has been decided by this Court to be due process of law in a rate case should be applied as it is for counsel for Appellants to argue in these rate cases that the decisions by this Court as to due process of law in tax cases (where public exigencies are involved) should be applied. The true doctrine is, we submit, that due process of law requires a proceeding which observes the principles of justice and is appropriate to the particular case under consideration; and it has been settled by this Court that a judicial proceeding is appropriate to rate cases.

Contempt.

It is claimed by the Appellants that the method of making and enforcing rates under the Virginia Constitution is justified as a judicial process, and is shown to be due process of

law, by the method by which the court protects itself from contempt.

Contempt is a summary remedy, but one that is not only adapted, but absolutely necessary, to the exercise of judicial powers and the enforcement of judicial authority. It is a part of the power that a judicial tribunal has to protect itself and its processes. It furnishes no basis for the claim that our whole jurisprudence should be founded on it, thereby making our judges, who are to impartially decide controversies, witnesses to testify, as well as judges to decide, and giving them unlimited and absolute power in respect of their functions. This procedure which has been adopted merely to make of courts efficient instrumentalities will not be extended in our jurisprudence beyond the absolute necessity for its exercise. The whole administration of justice will not be based on it. The fact that it has been so seldom abused in contempt cases is due to the sense of responsibility bred into our judges by the limits that our jurisprudence everywhere fixes on the orderly administration of justice.

THE WRIT OF INJUNCTION, WHICH IS A JUDICIAL WRIT, FURNISHES NO PROTOTYPE TO SHOW THAT THE MAKING OF RATES IS A JUDICIAL FUNCTION.

The difference between the injunction and the power of legislation to make rates found in the Virginia Commission is the same difference as is found between the injunction and the power of law making—the injunction declaring what the law already is, and being used to prevent certain kinds of private injury growing out of violation of the law, while the law-making power is the power to make rules of conduct for the future, which rules have not theretofore existed. The power of injunction begins where the power of law-making ends. It is all the difference between the judicial function of construing the law and the legislative function of making the law. It is the difference between fixing the law for the future and enforcing the law as it already exists.

To determine otherwise would be to destroy the difference between the judicial and the legislative power. That in fact is the inevitable result if the Appellants are sustained in these cases: the result may well be the putting of all judicial power into legislative hands as to the carriers of the country in the matters over which the State has authority. The State can no more put all judicial power into legislative hands than it can put all legislative power into judicial hands, and thereby destroy the essential differences between the legislative and the judicial function: and yet the most recent argument, as we understand it, of the Appellants in these cases is that all legislative powers in respect to common carriers can be put into the hands of a body called a court, and thereby be transformed into judicial powers, thus destroying the distinction between legislative and judicial functions which this Court has insisted on throughout its history; that is, that the making of a rate for the future is a legislative act and that the inquiry into its reasonableness after it is made is a judicial act.

MURRAY'S LESSEE V. HOBOKEN LAND & IMPROVEMENT CO., 18 HOWARD, 280.

It was claimed by Senator Daniel in his argument for the Appellants that it was competent for Congress to confer upon courts the administrative function of passing upon amounts due by the Government or to leave this matter in the hands of the executive department acting through its auditors or other executive officials. But this, it will be observed, was in reference to existing transactions, and not in regard to rules for the future, and of course might be judicial if properly presented, or might be executive, if properly presented. But in the case he relied on, this Court said, at page 284:

> "To avoid misconstruction upon so grave a subject we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the sub-

> ject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination."

And at page 280:

> "But it is not sufficient to bring such matters under the judicial power that they involve the exercise of judgment upon law and fact."

This case was pressed upon the attention of this Court in the brief of Appellants' counsel in the Reagan case. To use it again in the same connection is like an effort to reargue the Reagan case.

Efficiency of Remedy by Appeal.

As was pointed out in the Supplemental Brief for the Appellees, beginning at page 56, the fact that a remedy is given under the laws of a State can not affect the jurisdiction of the Federal courts in equity.

> Mississippi Mills *v.* Cohn, 150 U. S., 202.
> Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 391.
> Smyth *v.* Ames, 169 U. S., 516.

But we repeat here what was said in the oral argument that there are many objections to the appeal as given in the Virginia Constitution.

First: It would be an appeal to the Supreme Court of the United States from the legislative action of the Virginia Supreme Court of Appeals, and the Supreme Court of the United States would not, we submit, entertain such an appeal, its appellate jurisdiction being only from judicial actions, not from legislative actions.

Second: The only method of carrying the case from the Supreme Court of Appeals of Virginia to the Supreme Court of the United States would be by writ of error, and such writ of error would carry up only the questions of law, and would

not permit the Supreme Court of the United States to consider the facts.

Cases involving confiscatory rates are now generally dependent upon questions of fact (*Ex parte* Young, 209 U. S., 143-144); for example, the cost of doing intrastate business as compared with the cost of doing all business; and whether or not the company receives compensation from its intrastate business, and, if so, how much. As to these vital questions of fact which raise Federal questions, a railroad company carrying its case to the Supreme Court of the United States on writ of error is absolutely cut off from relief, and the apples of Sodom are fruits of joy in comparison with the satisfaction which a person carrying a cause on writ of error to the Supreme Court of the United States would be able to obtain.

Third: It is established by the case of Gordon *v.* United States, 117 U. S., 702, that this Court will not entertain an appeal from any tribunal not authorized to render a judicial judgment and to enforce it by appropriate process.

The substance of this is quoted approvingly in the case of Wallace *v.* Adams, 204 U. S., 415.

The effect given by the Virginia Constitution (Sec. 156, sub-section (*g*)) to an appeal reversing an order of the Commission and fixing at the same time a substitute tariff of rates, is that the "substituted order shall have the same force and effect (and none other) as if it had been entered by the Commission at the time the original order appealed from was entered." It therefore can not have the additional effect, which an order of the Commission would not of itself have, of being enforceable by the Supreme Court of Appeals by mandamus to the inferior tribunal or other appropriate process, and, if this Court, on writ of error, should entertain the appeal and should affirm, it would affirm an order which the Supreme Court of Appeals of Virginia could not have itself enforced, and which this Court could not enforce, as it would seem, because the order appealed from which it

affirms is declared by the Constitution of Virginia to have merely the force and effect of an order of the Commission, *and none other.*

Fourth: The proposition is advanced by counsel for the Appellants that the danger of multiplicity of actions in these cases is avoided as well by the supersedeas provided for in the Virginia Constitution, as by the injunction of a court of equity. While we take issue with counsel for the Appellants in respect to this matter, it is manifestly of no importance in these cases to consider whether the supersedeas provided by the Virginia Constitution is as effective as the injunction of a court of equity. Even if the Virginia system had provided for an injunction instead of having forbidden it, and thereby had given us an equitable remedy against a multiplicity of actions, there would still have been jurisdiction, as Federal questions are involved, in the Circuit Court of the United States to entertain a suit in equity and to prevent by its injunction a multiplicity of actions.

Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 391.

Smyth *v.* Ames, 169 U. S., 516.

Mississippi Mills *v.* Cohn, 150 U. S., 204.

Supplemental Brief for Appellees, page 55 *et seq.*

THE VIRGINIA SYSTEM IS AN EFFORT TO DESTROY FOR ALL PRACTICAL PURPOSES THE JURISDICTION OF THE FEDERAL COURTS TO GRANT THE PROTECTION OF THE FEDERAL CONSTITUTION TO LITIGANTS WHOSE RIGHTS UNDER THE FOURTEENTH AMENDMENTS ARE BEING INVADED.

It is admitted by the very form of the opposition made to the bills in these cases that the purpose is to destroy the jurisdiction of the Circuit Courts of the United States. The objection is made to the jurisdiction of the Circuit Courts that these courts can not have jurisdiction in cases covered by the Virginia Constitution. The only other way in which the

Federal questions involved could be considered at all by a Federal court would be on appeal to the Supreme Court of the United States from the Supreme Court of Appeals of Virginia. As has been pointed out, this can only be done by writ of error, and the writ of error would be useless as a check upon the invasion of constitutional rights threatened, if it should happen, as it generally does, in rate matters, that the Federal question is presented only by the facts of the case.

JURISDICTION MUST BE TAKEN BY THE FEDERAL COURTS IF IT EXISTS, AND THE FACT THAT A REMEDY IS GIVEN BY THE STATE CAN NOT AFFECT THE DUTY OF THE FEDERAL COURTS TO TAKE JURISDICTION IN A CASE OF WHICH THEY HAVE JURISDICTION.

A person entitled to the protection by the Federal courts of his rights growing out of the Constitution of the United States is not obliged to seek relief in the state courts. He has also open to him the Federal courts, and whether he take one or the other is a matter for the litigant to determine.

The Complainants in these causes could not be required to first pursue the appeal provided by the Virginia Constitution. Whatever may have been their reasons, good or bad, for preferring the Federal tribunal, the court in which relief is sought having jurisdiction of the matter, can not decline the jurisdiction and force the party into the state tribunal.

As was said by Justice Peckham in *Ex parte* Young, 209 U. S., at pages 142 and 143:

> "The question of jurisdiction, whether of the Circuit Court or of this Court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the Circuit Court is the assertion that the suit is in effect against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide. Under these circumstances, the language of Chief

Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264-404, is most apposite. In that case he said:

"'It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty.'"

We respectfully submit, therefore, that the jurisdiction of the Federal courts must, when properly invoked, be extended to any cause of which they have jurisdiction irrespective of whether or not there is a remedy in the state courts, and irrespective of the merits or demerits of such remedy in the state courts.

The Reagan Case.

This is a mere effort to reargue the Reagan case.

It will be seen from the brief of the Attorney General of Texas and other counsel representing the Appellants in the Reagan case that the same claims that are made for the purpose of destroying the jurisdiction of the Federal court in the cases at bar were substantially made in that case, and were disapproved by this Court. A few of those propositions may be quoted from the brief of the Attorney General (on file in the clerk's office of this Court):

Propositions Overruled in Reagan Case.

"Proposition.

"There being no charge of personal trespass, or liability, and the acts sought to be enjoined, being acts of official discretion under the Constitution and laws of Texas, and the injunction being sought to effect and defeat the exercise of a governmental power, it becomes a suit against the State of Texas and obnoxious to the 11th amendment of the Constitution of the United States."

Brief of Attorney General of Texas, page 25.

"Proposition.

"It appearing from the face of the bill that Complainants seek to enjoin the judgment of a special tribunal of the State of Texas, which has under the Constitution and laws of Texas jurisdiction to render the decision sought to be enjoined from which judgment or decision an appeal has been provided by law for all parties interested and dissatisfied with said judgment or decision; the United States Circuit Court would have no jurisdiction to entertain the bill or grant the relief prayed for." (Page 28.)

"Sub-Proposition 1.

"The Railroad Commission of Texas as organized under the Constitution and laws of Texas, is a tribunal of special jurisdiction, having within the sphere of its jurisdiction, full power to hear, determine and enter its judgment, and it is submitted, comes within the meaning of a court as used in section 720 of the Revised Statutes of the United States." (Page 30.)

Under this proposition there are set out in detail certain powers and insignia of the Commission which the Attorney General of Texas insisted were the characteristics of a court, the one especially emphasized being the requirement

that notice of the time and place when the rates were to be inquired into and fixed, and an opportunity to be heard, should be afforded to any person to be affected thereby.

"Sub-Proposition 2.

"It being the settled law of this Court, that the power to regulate freight, etc., on public highways is a governmental power, and the establishment of agencies for that purpose, within the limits of the State is a constitutional right of the State; it is submitted that the State may create a judicial or administrative body, and confer such powers, judicial or otherwise, as will in its discretion best effect the purpose intended." (Page 33.)

"Sub-Proposition 3.

"The State of Texas having under its constitutional provisions, created a tribunal, or special agency, and given to it judicial powers and functions, its decrees, judgments, findings and decisions, within the scope of its purpose, and the jurisdiction granted, are as conclusive and effective as courts of general jurisdiction and cannot be collaterally questioned in a different tribunal." (Page 34.)

"Sub-Proposition 4.

"If a Federal question arises in the processes provided for the fixing of rates by the Commission, the decision of which was necessary to the determination of the cause, it can only be determined by appeal or writ of error from the court of last resort in the State to the Supreme Court of the United States." (Page 35.)

It will be remembered that under the Texas statute the following (as shown by page 28 of the Appellees' Supplemental Brief) was the provision as to notice and a hearing:

"Before any rates shall be established under this act, the Commission shall give the railroad company to be affected thereby ten days' notice of the time and

> place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done; and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases."

and that the notice provided for in the Virginia Constitution, section 156, sub-section (*b*), is as follows:

> "Before the Commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the Commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the City of Richmond, Virginia, together with notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement."

It will, therefore, be seen that all of the substantial characteristics of the procedure in Virginia in fixing a rate are present in the procedure required to be observed by the Texas Commission in fixing a rate in Texas.

It will appear from this and from the foregoing propositions advanced by the Attorney General of Texas before this

Court in his argument of the Reagan case, that the very same contentions were made in that case as are made in this, and were deliberately overruled or disregarded. A case so often referred to with approval by this Court, and so much relied on by the bar and bench of the country is not, we rest assured, to be disregarded or reconsidered now.

By reference to "Supplemental Brief for Appellees on the Question of Jurisdiction" it will be seen that the question whether or not the Circuit Court of the United States for the Eastern District of Virginia had jurisdiction to entertain these cases, and to grant an injunction as prayed, was discussed under two separate and independent heads, and that if the contention made under either of these heads be sustained, the decree of the lower court must be affirmed. We respectfully urge, however, that both of these contentions are sound.

The first of these contentions was that, even on the argumentative concession that the Commission is a constitutional body notwithstanding the Fourteenth Amendment to the Constitution of the United States, its members are, when attempting to invade the property rights of the Appellees, protected by that amendment, subject to be enjoined by the appropriate circuit court of the United States.

The second was that the Commission of Virginia, because the Constitution of the State undertakes to confer upon, and unite in, it the whole power of the State, legislative, executive and judicial, in respect to the rates in controversy, is, by the law of its creation, made a partial tribunal, and, hence, its judgments can not satisfy the requirements of due process of law; and that, since the provisions creating it and conferring its powers are not separable, such provisions are void

in toto, and the Commission being an invalid body, its acts are without warrant of law and subject to be enjoined.

All that has been heretofore said in this Reply Brief refers to the first of these points, the discussion of which in the Supplemental Brief referred to begins on page 10.

In respect to the second, as to which there was not sufficient time in the oral argument to make a full presentation, we beg to refer to the discussion contained in the Supplemental Brief for the Appellees, beginning at page 94.

It is argued in the briefs of counsel for the Appellants that the provisions of the Virginia Constitution creating the State Corporation Commission and imposing executive, legislative and judicial powers upon it do not violate article 4, section 4, clause 1 of the United States Constitution, providing that "the United States shall guarantee to every State in this Union a republican form of government." With reference to this, we may say that this contention has never been made and is not now made on behalf of the Appellees. The proposition advanced by the Appellees, as to the independent point involving the validity of the Commission, is, as outlined above, that the provisions of the Virginia Constitution creating the Commission and conferring its powers violate the prohibition of the Fourteenth Amendment to the Constitution of the United States, against the taking by a State of the property of a person without due process of law, because such provisions undertake to confer upon and unite in the Commission *the whole power* of the State, executive, legislative and judicial, with respect to the same interests, thereby making the Commission a tribunal incapable of administering impartial justice, and that the provisions referred to, not being separable, are therefore invalid *in toto*, and their creation, the Commission, an invalid tribunal.

For a full statement of the position and argument of the Appellees on this point, attention is respectfully invited to Supplemental Brief for Appellees on the Question of Jurisdiction, beginning at page 94.

On this latter point we desire in this Reply Brief merely to refer to the analogy sought to be established by the Attorney General in his brief between

THE COMMISSION OF VIRGINIA AND THE PARLIAMENT OF ENGLAND.

In regard to the comparison between the Virginia Commission and Parliament made by the Attorney General of Virginia in his brief for Appellants to show that the Commission is a valid tribunal, we have this to say:

The analogy sought to be drawn by the Attorney General of Virginia between the Virginia Commission and Parliament can have no weight in the determination of the question of whether the Virginia Commission is a valid tribunal, under the terms of the Fourteenth Amendment to the Constitution of the United States.

The vital difference between the form of government existing in England and that under which citizens of the United States live is well stated by Mr. Justice Matthews, who delivered the opinion of this Court in Hurtado *v.* California, 110 U. S., at page 531, where he said:

> "The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case*, 8 Rep., 115, 118*a*, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

"In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

"It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure but the very substance of individual rights to life, liberty and property."

Attention is also called to the discussion of this subject by Mr. Guthrie in his "The Fourteenth Amendment to the Constitution of the United States," in which, on pages 68 and 69, he says:

"The words 'due process of law' mean infinitely more under our system of government than they ever did or do now in England. There the provision restricts only the King; it leaves Parliament unrestrained."

After quoting the above language from Justice Matthews in the Hurtado case, Mr. Guthrie continues:

"Under the English system, the rule of Parliament is not restricted by any constitutional limitations. * * * The theory of English constitutional law is entirely different from the theory of the American system. Many English statutes would be nullified by our courts; and much of the legislation relating to

Ireland would be declared unconstitutional in the United States. One hundred and five years ago, Mr. Justice Wilson, in Chisholm *v.* Georgia, compared our form of government with the British, and said that the latter was but a despotism of Parliament; and ninety years later Mr. Justice Miller, in United States *v.* Lee, again set forth the vast difference in the essential character of the two systems of government, and showed that in this country no man is so high that he is above the law; that no officer of the national or state governments may set the law at defiance with impunity; and that our courts of justice are established, not only to decide upon the controverted rights of citizens as against each other, but also to pass upon rights in controversy between them and the government."

Respectfully submitted,

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WASHINGTON, D. C., *October* 22, 1908.

POOR COPY

PRENTIS *et al.*, CONSTITUTING THE STATE CORPORATION COMMISSION OF VIRGINIA, *v.* ATLANTIC COAST LINE COMPANY.

SAME *v.* CHESAPEAKE AND OHIO RAILWAY COMPANY.

SAME *v.* CHESAPEAKE WESTERN RAILWAY.

SAME *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

SAME *v.* NORFOLK AND WESTERN RAILWAY COMPANY.

SAME *v.* SOUTHERN RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Nos. 270, 271, 272, 273, 274, 275. Argued October 16, 19, 20, 1908.—Decided November 30, 1908.

So far as the Federal Constitution is concerned, a State may, by constitutional provision, unite legislative and judicial powers in the same body.

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under existing laws, while legislation looks to the future and changes conditions, making new rules to be thereafter applied.

The making of a rate by a legislative body, after hearing the interested parties, is not *res judicata* upon the validity of the rate when questioned by those parties in a suit in a court. Litigation does not arise until after legislation; nor can a State make such legislative action *res judicata* in subsequent litigation.

Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stat. § 720, no matter what may be the character of the body in which they take place.

Whether a railroad rate is confiscatory so as to deprive the company of its property without due process of law within the meaning of the Fourteenth Amendment depends upon the valuation of the property, the income derivable from the rate, and the proportion between the two, which are matters of fact which the company cannot be prevented from trying before a competent tribunal of its own choosing.

Where a state railroad commission, which is granted power by the state constitution to make and enforce rates, enacts and attempts to enforce rates which are so low as to be confiscatory, the proper remedy is by bill in equity to enjoin such enforcement, and such a suit against the members of the commission will not be bad as one against the State, but it should not be commenced until the rate has been fixed by the body having the last word.

While a party does not lose his right to complain of action under an unconstitutional law by not using diligence to prevent its enactment, on a question of railroad rates, when an appeal to the Supreme Court of the State from an order of the State Corporation Commission fixing such rates is given by the state constitution, it is proper that dissatisfied railroads should take this matter to the Supreme Court of their State before bringing a bill in the Circuit Court of the United States. Under the circumstances of this case action on a bill was suspended to await the result of such an appeal.

THE facts are stated in the opinion.

Mr. William A. Anderson, Attorney General of the State of Virginia, *Mr. John W. Daniel* and *Mr. A. Caperton Braxton*, for appellants:

Regulation of transportation companies, particularly as to *intra*state rates is an essential attribute of the State government, a legitimate and necessary part of the police power, to be exercised by such body as the State may select and clothe with the necessary powers. *Munn* v. *Illinois*, 94 U. S. 113; *Granger Cases*, 94 U. S. 155; *Railroad Commission Cases*, 116 U. S. 307; *Smythe* v. *Ames*, 169 U. S. 523; *Minn. &c. R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 394, 413; *St. Louis &c. R. R. Co.* v. *Gill*, 156 U. S. 658.